Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

ERIN DYKEMA,

Petitioner,

v.

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation,

Respondents,

STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the National Traffic and Motor Vehicle Safety Act, formerly 15 U.S.C. §§1381-1431, expressly preempt the petitioner's state common law claims based upon the negligent design and the unreasonably dangerous and defective condition of a motor vehicle passenger restraint system which complied with Federal Motor Vehicle Safety Standard 208, 49 C.F.R. §571.208?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE 4

I. Federal Regulation Of Restraint Systems 5

II. Proceedings In The Trial Court 8

III. The Decision Of The Appellate Court 10

A. The *Boyle* decision 11

B. The *Dykema* decision 12

REASONS FOR GRANTING THE WRIT 13

I. THE COURT OF APPEALS' CONCLUSION THAT PETITIONER'S CLAIMS ARE EXPRESSLY PREEMPTED BY THE SAFETY ACT IS CONTRARY TO ALL OF THE DECISIONS OF THE FEDERAL COURTS OF APPEAL AND MANY OF THE DECISIONS OF THE STATE APPELLATE COURTS WHICH HAVE CONSIDERED THE ISSUE ... 15

II. THE WISCONSIN COURT OF APPEALS MISINTERPRETED *CIPOLLONE* AS PROVIDING SUPPORT FOR ITS FINDING OF EXPRESS PREEMPTION 21

TABLE OF CONTENTS – Continued

Page

III. OTHER STATES HAVE REJECTED EXPRESS PREEMPTION IN CASES INVOLVING IDENTICAL CLAIMS 23

IV. THE COURT OF APPEALS' DECISION CONFLICTS WITH ITS OWN DECISION IN *DERBY* 25

V. EXPRESS PREEMPTION IS THE ONLY ISSUE PRESENTED; THE ISSUE OF IMPLIED PREEMPTION MAY BE REMANDED TO THE WISCONSIN COURT 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Baird v. General Motors Corp., 654 F.Supp. 28 (N.D.Ohio 1986) 20

Boyle v. Chrysler Corp., 177 Wis.2d 207, 501 N.W.2d 865 (Ct.App. 1993), *review denied*, 179 Wis.2d clxxxvii, 510 N.W.2d 137 (1993) ..... *passim*

Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777 (3rd Cir. 1992) ..... *passim*

Byrnes v. Honda Motor Co., Ltd., 845 F.Supp. 875 (S.D.Fla. 1994) 20

Cipollone v. Liggett Group, Inc., ___ U.S. ___, 112 S.Ct. 2608 (1992) ..... *passim*

Contant v. Kawasaki Motors Corp., 848 F.Supp. 170 (M.D.Fla. 1994) 20

Cox v. Baltimore County, 646 F.Supp. 761 (D.Md. 1986) 21

Dallas v. General Motors Corp., 725 F.Supp. 902 (W.D.Tex. 1989) 20

Derby v. Brenner Tank, Inc., 187 Wis.2d 244, 522 N.W.2d 274 (Ct.App. 1994), *review denied*, ___ Wis.2d ___, 527 N.W.2d 335 (1994) 15, 25, 26, 27

Freightliner Corp. v. Myrick, 514 U.S. ___, 115 S.Ct. 1483 (1995) 13, 22, 24, 27, 29

Garrett v. Ford Motor Co., 684 F.Supp. 407 (D.Md. 1987) 20

Gingold v. Audi-NSU-Auto Union, A.G., 567 A.2d 312 (Pa.Super. 1989) 20

Heath v. General Motors Corp., 756 F.Supp. 1144 (S.D.Ind. 1991) 20

TABLE OF AUTHORITIES – Continued

Page

Hernandez-Gomez v. Leonardo, 180 Ariz. 297, 884 P.2d 183 (1994), *vacated and remanded, Volkswagen of America, Inc. v. Hernandez-Gomez*, (U.S. May 1, 1995) (No. 94-1305) 14, 23

Hyundai Motor Co. v. Phillip, 639 So.2d 1064 (Fla.App. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 901 (1995) 14, 20, 22, 24

Hillsborough County v. Automated Medical Lab, Inc., 471 U.S. 707 (1985) 16

Jordan v. Paccar, Inc., 792 F.Supp. 545 (N.D.Ohio 1992) 20

Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) 15

Kolbeck v. General Motors Corp., 702 F.Supp. 532 (E.D.Pa. 1988) 20

Loulos v. Dick Smith Ford, Inc., 882 S.W.2d 149 (Mo.App. 1994) 20, 22

Marrs v. Ford Motor Co., 852 S.W.2d 570 (Tex.App. 1993) 20, 22

Maryland v. Louisiana, 451 U.S. 725 (1981) 16

Miranda v. Fridman, 647 A.2d 167 (N.J.Super. 1994) 21

Montag v. Honda Motor Co., Ltd., 856 F.Supp. 574 (D.Colo. 1994) 21

Murphy v. Nissan Motor Corp., 650 F.Supp. 922 (E.D.N.Y. 1987) 20

Myrick v. Freuhauf Corp., 13 F.3d 1516 (11th Cir. 1994), *affirmed on other grounds, Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995) .. *passim*

TABLE OF AUTHORITIES – Continued

Page

Perry v. Mercedes Benz of North America, Inc., 957 F.2d 1257 (5th Cir. 1992) ..... *passim*

Pokorny v. Ford Motor Co., 902 F.2d 1116 (3rd Cir. 1990), *cert. denied*, 498 U.S. 853 (1990) ..... *passim*

Richards v. Michelin Tire Corp., 786 F.Supp. 959 (S.D.Ala. 1992) 20

Schick v. Chrysler Corp., 675 F.Supp. 1183 (D.S.D. 1987) 20

Staggs v. Chrysler Corp., 678 F.Supp. 270 (N.D.Ga. 1987) 20

Swope v. STI Transit Co., 796 F.Supp. 160 (E.D.Pa. 1992) 20

Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) ... *passim*

Vanover v. Ford Motor Co., 632 F.Supp. 1095 (E.D.Mo. 1986) 21

Volkswagen of America, Inc. v. Hernandez-Gomez, (U.S. May 1, 1995) (No. 94-1305) 14, 23

Wattelet v. Toyota Motor Co., 676 F.Supp. 1039 (D.Mont. 1987) 21

Welsh v. Century Products, Inc., 745 F.Supp. 313 (D.Md. 1990) 20

Wickstrom v. Maplewood Toyota, Inc., 416 N.W.2d 838 (Minn.Ct.App. 1987), *cert. denied*, 487 U.S. 1236 (1988) 21

Wilson v. Pleasant, 645 N.E.2d 638 (Ind.App. 1994) .. 20, 22

Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) 15, 16, 17, 24

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

15 U.S.C. §§1381-1431 ..... 1, 5

15 U.S.C. §1392(a) 3

15 U.S.C. §1392(d) ..... *passim*

15 U.S.C. §1397(c) 4, 5, 6, 17

15 U.S.C. §1397(k) ..... *passim*

28 U.S.C. §1257(a) 2

49 U.S.C. §30101 *et seq* 5

49 U.S.C. §30103(b) 5

49 U.S.C. §30103(e) 5

FMVSS 208 ..... *passim*

49 C.F.R. §571.208 ..... 6, 8, 10

49 C.F.R. §571.208 S1 6

49 C.F.R. §571.208 S4.1.2 ..... 4, 7, 8

49 C.F.R. §571.208 S4.1.2.1-.3 6

49 C.F.R. §571.208 S4.5.3 ..... 4, 7, 8

49 C.F.R. §571.208 S4.5.3.1 ..... 4, 7, 8

39 Fed.Reg. 3834 (1974) 7

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On Petition For A Writ Of Certiorari To The Court Of Appeals Of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

Petitioner Erin Dykema respectfully petitions for a writ of certiorari to review the judgments of the Court of Appeals of Wisconsin in this action. The court of appeals held that the National Traffic and Motor Vehicle Safety Act, formerly 15 U.S.C. §§1381-1431, expressly preempts petitioner's common law claims based upon the defective design of a restraint system which complied with Federal Motor Vehicle Safety Standard ("FMVSS") 208. Contrary to the decisions of every federal court of appeals and virtually every state appellate court which has considered

the issue, the Court of Appeals of Wisconsin rejected application of the savings clause in 15 U.S.C. §1397(k) and held that imposition of common law liability for a defect in a motor vehicle which complied with the applicable FMVSS would establish a "safety standard" different than the federal standard, and therefore is expressly preempted by 15 U.S.C. §1392(d).

OPINIONS BELOW

The opinion of the Court of Appeals of Wisconsin (App. 1-App. 9) is reported at 189 Wis.2d 206, 525 N.W.2d 754.

The order of the Wisconsin Supreme Court declining to grant review of the decision of the Court of Appeals of Wisconsin (App. 28-App. 29) is not yet reported.

The decision of the Circuit Court for Milwaukee County, Wisconsin, granting petitioner's motion to strike respondents' affirmative defense of federal preemption (App. 10-App. 14) is not reported. The decision of the Circuit Court for Milwaukee County denying respondents' motion to dismiss petitioner's claims on the ground of federal preemption (App. 19-App. 24) is not reported.

JURISDICTION

This case involves the review of judgments of the Court of Appeals of Wisconsin which were entered on February 23, 1995. By order dated February 21, 1995, the Wisconsin Supreme Court declined to review the decision of the Court of Appeals of Wisconsin which was issued on November 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTES INVOLVED

The National Traffic and Motor Vehicle Safety Act, as codified at all times relevant to this case, provided in pertinent part:

15 U.S.C. §1392

Establishment

(a) The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

* * *

Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or State governments

(d) Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement

applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * *

15 U.S.C. §1397

* * *

Continuation of common law liability

(c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

49 C.F.R. §571.208 S4.1.2.

Included in the appendix.

49 C.F.R. §571.208 S4.5.3.

S4.5.3 Passive belts. Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as a "passive belt") may be used to meet the crash protection requirements of any option under S4 and in place of any seat belt assembly otherwise required by that option.

S4.5.3.1 A passive belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly.

STATEMENT OF THE CASE

Contrary to the decisions of the federal courts of appeal and other state appellate courts, the Court of Appeals of Wisconsin held that because the restraint system in petitioner's 1978 Volkswagen Rabbit automobile

complied with FMVSS 208, petitioner's common law claims, based on the failure of the system to incorporate a lap belt or other adequate pelvic restraint, were *expressly* preempted by the National Traffic and Motor Vehicle Safety Act ("Safety Act") pursuant to 15 U.S.C. §1392(d).

I. Federal Regulation Of Restraint Systems.

In 1966, Congress enacted the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§1381-1431.[1] The Safety Act contains two provisions addressing the subject of preemption. One is 15 U.S.C. §1392(d),[2] which states in pertinent part:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

The other provision, referred to as the "savings clause," is set forth in 15 U.S.C. §1397(c),[3] and it provides:

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[1] Effective July 5, 1994, those statutes were recodified, and the statutes regarding motor vehicle safety are now in 49 U.S.C. §30101 et seq. The petitioner will refer to the statutes by their former designation.

[2] This section was recodified with minor changes as 49 U.S.C. §30103(b).

[3] Effective January 31, 1990, §1397(c) was redesignated as §1397(k). Effective July 5, 1994, 15 U.S.C. §1397(k) was recodified with minor changes as 49 U.S.C. §30103(e). Sec. 1397(c) was in effect when petitioner was injured. Because the statute is most commonly referred to in the case law as §1397(k),

Continuation of common law liability

> (c) Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

The federal regulation at issue in this case is FMVSS 208, which is codified as 49 C.F.R. §571.208 and was promulgated by the National Highway Traffic Safety Administration ("NHTSA") pursuant to the Safety Act. It "specifies performance requirements for the protection of vehicle occupants in crashes." 49 C.F.R. §571.208 S1.

The version of FMVSS 208 which was in effect when petitioner's 1978 Volkswagen Rabbit was manufactured by Volkswagenwerk AG and sold by Volkswagen of America, Inc. (hereinafter collectively referred to as "VW") provided that with respect to the front outboard seating positions of passenger cars manufactured between September 1, 1973 and August 31, 1981, a manufacturer could comply by providing protection under one of three options:

> Option one – passive protection for all crash modes (frontal, lateral and rollover).
>
> Option two – passive protection for frontal crashes and a Type 1 (lap belt) seat belt assembly.
>
> Option three – manual lap-shoulder belt combination.

49 C.F.R. §571.208, S4.1.2.1-.3 (1978) (App. 34-App. 36)

In 1973, VW developed a restraint system which it designated as "VWRA." That system was incorporated into petitioner's 1978 VW Rabbit and consisted of a diagonal shoulder harness attached to the front door of the

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petitioner will hereinafter refer to the statute by that designation.

automobile. Once the occupant was in the seat and the door closed, the shoulder harness would automatically be in place and thus the system was known as a "passive" system. (App. 3) No lap belt was provided either as a passive or an active component.

VW had determined that the VWRA system was not capable of meeting the crash protection requirements of FMVSS 208 for lateral crashes. (R. Exhibit 234) Therefore, VW petitioned NHTSA to add a fourth option to the FMVSS 208 scheme to permit a passive system which did not meet the lateral crash protection requirements. (*Id.*) NHTSA denied VW's petition, concluding that a fourth option was unnecessary. 39 Fed.Reg. 3834 (January 30, 1974). NHTSA stated as follows:

> Volkswagen petitioned for a new crash protection option under S4.1.2 to permit the introduction and field testing of its passive belt system, which consists of an upper torso restraint and knee padding, in its 1975 model cars. Paragraph S4.5.3 of the standard already permits the use of a passive belt system "to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option." Thus, this language permits the use of the Volkswagen passive belt system to meet the perpendicular impact protection requirements of option two and to replace the required seat belt assemblies.

Thus, NHTSA indicated that the VWRA system could comply with option two of FMVSS 208 through S4.5.3, even though the system had no lap belt.

At the time VW developed the VWRA restraint system, sec. S4.5.3 stated in part:

> S4.5.3. Passive belts. Except as provided in S4.5.3.1, a seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as a "passive belt") may be used to meet the

> crash protection requirements of any option under S4 and in place of any seat belt assembly otherwise required by that option.
>
> S4.5.3.1. A passive belt that provides only pelvic restraint may not be used pursuant to S4.5.3 to meet the requirements of an option that requires a Type 2 seat belt assembly.

The circuit court in this case concluded that the VWRA system complied with FMVSS 208. (R. 151:2-3)

II. Proceedings In The Trial Court.

Petitioner was injured in April, 1988, when the VW Rabbit left the roadway and rolled over. (App. 3) Although she was using the VWRA restraint system, she was ejected from the automobile and rendered quadriplegic when her neck snapped against the shoulder harness.

Petitioner sued VW in state court, asserting negligence and strict products liability claims based on, among other things, the failure to provide an adequate restraint system and the failure to provide a lap belt as part of that system. (R. 34:6-7, 9)

VW raised federal preemption as an affirmative defense. (R. 38:9) Petitioner moved to strike this defense. (R. 40:1-3) She argued that her claims were not preempted by 49 C.F.R. §571.208 pursuant to 15 U.S.C. §1392(d), and that her claims were preserved pursuant to the savings clause set forth in 15 U.S.C. §1397(k). (R. 42:6-20) VW argued that petitioner's claims were preempted pursuant to §1392(d) because imposition of liability in this case would have the effect of eliminating one of the restraint system options set forth in 49 C.F.R. §571.208, S4.1.2, S4.5.3. (R. 44:7-22) The Circuit Court for Milwaukee County, Wisconsin, the Honorable William D. Gardner, Circuit Judge, presiding, granted petitioner's

motion to strike. (R. 313:5-8; App. 10-App. 14) In doing so, the court stated:

> It must be remembered that Plaintiffs' claim is that Defendant's product was defectively designed. The question is not whether the vehicle did or did not have air bags or other passive restraints, but whether the vehicle was defectively designed. There was no attempt by the pleadings here to establish a new safety standard or to find Defendants liable for selecting one NASTA [sic] standard rather than another.

(R. 313:7; App. 13) An order striking the affirmative defense was entered on September 10, 1991. (R. 47; App. 15-App. 18)

On July 13, 1992, the case proceeded to trial, at which time petitioner presented expert opinion testimony that the VW Rabbit was defective and that VW was negligent because the VWRA system failed to provide adequate pelvic restraint and should have had a lap belt, particularly for rollover accidents. (R. 331:187-90, 211-13; 348:110; 349:123-26, 136-39; 342:32-39; 354:129, 183, 187-88; 357:114-22).

At the close of petitioner's case, VW moved for a dismissal of petitioner's lawsuit based on implied and express federal preemption. (R. 168:1) The circuit court denied the motion. (R. 370:3-8; App. 19-App. 24) The court held that the language of §1392(d) "does not relate to common law actions but to state statutes and regulations. Standards are not imposed by verdicts in tort actions." (R. 370:4; App. 21). The court also held that §1397(k) provided a further indication that it was not the intent of Congress to preempt common law tort actions. (R. 370:4; App. 21). The court held that petitioner's claims were neither expressly nor impliedly preempted by the Safety Act, distinguishing this case from the "no air bag"

cases, in which some courts found implied preemption. (R. 370:6-7; App. 22-App. 23)

The jury returned their verdict on September 16, 1992, finding that the VW Rabbit was not defective and that VW was not negligent. (R. 189)

On October 6, 1992, petitioner filed motions after verdict, including a motion for a new trial because of jury contamination and juror misconduct. (R. 204) On December 15, 1992, the circuit court issued a decision denying the motions. (R. 237) On April 1, 1993, judgment was entered in favor of VW dismissing the complaint and awarding costs. (R. 256; App. 25-App. 27) On September 24, 1993, an amended judgment was entered changing the amount of costs. (R. 405)

III. The Decision of The Appellate Court.

After petitioner appealed from the judgment in favor of VW (R. 306), VW cross-appealed from the circuit court's orders denying VW's motion to dismiss and striking the federal preemption defense. (R. 309) Petitioner also subsequently appealed from the amended judgment in favor of VW. (R. 407) In a decision dated November 8, 1994, the Court of Appeals of Wisconsin, relying on its decision in *Boyle v. Chrysler Corp.*, 177 Wis.2d 207, 501 N.W.2d 865 (Ct.App. 1993), *review denied*, 179 Wis.2d clxxxvii, 510 N.W.2d 137 (1993), held that petitioner's claims were expressly preempted by federal law, pursuant to 15 U.S.C. §1392(d) and 49 C.F.R. §571.208. (App. 8) Accordingly, the court affirmed the judgments of the circuit court without addressing the issues raised by petitioner. (App. 2-App. 3)

A. The *Boyle* decision.

Because the court of appeals relied upon its decision in *Boyle v. Chrysler Corp.*, a discussion of *Boyle* is necessary.

In *Boyle*, the plaintiff's automobile was equipped with a restraint system which consisted of a manual lap belt/shoulder harness. She claimed that the automobile was defective because it was not equipped with an air bag or other passive restraint. The court of appeals held that the plaintiff's claim was expressly preempted by §1392(d). After quoting §1392(d), the court stated:

> One of the options [in FMVSS 208] is the manual lap and shoulder seat belts for each front outboard seating position, with which the 1980 Plymouth Horizon was equipped. Because Chrysler elected to equip the Horizon with restraints authorized by the code, it is within the purview of the explicit preemption provision prohibiting states from requiring different restraints.

177 Wis.2d at 217, 501 N.W.2d at 869.

The court rejected Boyle's argument that §1392(d) only preempted a state "safety standard" and not common law tort claims:

> Boyle contends that because the explicit preemption clause does not specifically preempt common-law claims, they are not explicitly preempted. However, the United States Supreme Court recognized that, for purposes of preemption law, "the phrase 'state law' . . . include[s] common law as well as statutes and regulations." *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2620 (1992).

177 Wis.2d at 217, 501 N.W.2d at 869.

The court also rejected Boyle's argument based on the savings clause in §1397(k). 177 Wis.2d at 218, 501

N.W.2d at 869-70. The court reasoned that "the savings clause preserves only those common-law liability claims that do not conflict with the automobile safety equipment standards that Congress enacted." 177 Wis.2d at 218, 501 N.W.2d at 869.

The court also held that Boyle's claim was impliedly preempted by the Safety Act. 177 Wis.2d at 219-22, 501 N.W.2d at 870-71. The court relied on several federal cases, including *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), which held that the Safety Act impliedly preempts claims based on manufacturers' failure to equip their vehicles with air bags.

B. The *Dykema* decision.

In deciding this case, the Wisconsin court did not discuss its reasoning in detail, but merely held that *Boyle* was not distinguishable from this case, and concluded "that the holding and analysis in *Boyle* controls." (App. 8) The court held that petitioner's common law claims would result in establishing a "safety standard" different from the federal standard and were, therefore, expressly preempted pursuant to 15 U.S.C. §1392(d). The court's actual holding consists of the following paragraph:

> The VWRA system with which VW elected to equip the 1978 Volkswagen Rabbit complies with the requirements of FMVSS 208, and therefore "is within the purview of the explicit preemption provision prohibiting states from requiring different restraints." *Id.* [*Boyle*] at 217, 501 N.W.2d at 869. Thus, Dykema's claims, which were based upon VW's alleged failure to provide reasonably adequate lower pelvic restraint, would establish a different safety standard from that required by federal law. *Boyle*

> specifically states that such claims are preempted. *Id; see Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2620 (1992) (holding that for purposes of federal preemption, state law includes statutes, regulations, *and* common-law actions).

(Emphasis in the original.) (App. 8)

Petitioner filed a petition requesting the Wisconsin Supreme Court to review the decision of the court of appeals. On February 21, 1995, the Wisconsin Supreme Court denied the petition for review. (App. 28-App. 29) On February 23, 1995, the court of appeals issued judgments affirming the judgments of the circuit court. (App. 30-App. 33)

REASONS FOR GRANTING THE WRIT

This case squarely presents the issues of whether the term "safety standard" as used in the preemption clause in 15 U.S.C. §1392(d) refers to common law tort liability and what is the effect of the savings clause in 15 U.S.C. §1397(k). These issues were argued by the parties and amici curiae in *Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995), but because the Court concluded that there was no applicable federal safety standard in that case, the Court did not address those issues. Because this case involves an applicable federal standard and only an issue of express preemption, it provides the Court with the perfect opportunity to resolve the conflicts concerning the statutory interpretation of the Safety Act's preemption clause and savings clause.

The decision of the Court of Appeals of Wisconsin that petitioner's state common law claims alleging a defect in a restraint system which complied with FMVSS 208 are *expressly* preempted by the Safety Act by virtue of 15 U.S.C. §1392(d) is in conflict with the decisions of all of the federal courts of appeal which have considered the issue. *See, e.g., Taylor v. General Motors Corp.*, 875 F.2d 816

(11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), and other cases cited in the discussion below.

Express preemption under the Safety Act has also been rejected in decisions of other state appellate courts, including some involving restraint systems identical to the system in this case. For example, this Court recently considered a petition for a writ of certiorari with regard to the decision of the Arizona Supreme Court in *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 884 P.2d 183 (1994), which involved identical claims with regard to the identical restraint system in this case. As is discussed below, although this Court in *Volkswagen of America, Inc. v. Hernandez-Gomez* (U.S. May 1, 1995) (No. 94-1305), vacated the judgment in *Hernandez-Gomez* and remanded the case to the Arizona Supreme Court, the Arizona Supreme Court's analysis and rejection of express preemption would appear to be unaffected by the vacation and remand. *See also Hyundai Motor Co. v. Phillip*, 639 So.2d 1064, 1066 (Fla. App. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 901 (1995). Thus, in Arizona and Florida, petitioner Erin Dykema's claims would not be found expressly preempted by the state court, but because she lives in Wisconsin, they are.

Although the court of appeals in this case relied on *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S.Ct. 2608, 2620 (1992), in support of its interpretation of §1392(d) (App. 8), *Cipollone* did not warrant the court of appeals' departure from the reasoning of the federal circuit courts with regard to express preemption, because *Cipollone* involved a preemption provision worded much more broadly than §1392(d). Indeed, subsequent to *Cipollone*, state appellate courts have found no express preemption of common law claims under the Safety Act.

Besides conflicting with the controlling decisions of the federal courts of appeal and decisions of other state

appellate courts, the court of appeals' decision in this case conflicts with its own analysis of express preemption in *Derby v. Brenner Tank, Inc.*, 187 Wis.2d 244, 522 N.W.2d 274 (Ct.App. 1994), *review denied*, ___ Wis.2d ___, 527 N.W.2d 335 (1994). Both cases involved the interpretation of 15 U.S.C. §1392(d) and §1397(k). In *Derby*, the court construed the two provisions together and held that the imposition of liability under state common law is not encompassed by the term "safety standard" in §1392(d), but in this case, the court reached the opposite conclusions. The conflict has left the courts of Wisconsin with no guidance on the issue.

I. THE COURT OF APPEALS' CONCLUSION THAT PETITIONER'S CLAIMS ARE EXPRESSLY PREEMPTED BY THE SAFETY ACT IS CONTRARY TO ALL OF THE DECISIONS OF THE FEDERAL COURTS OF APPEAL AND MANY OF THE DECISIONS OF THE STATE APPELLATE COURTS WHICH HAVE CONSIDERED THE ISSUE.

The court of appeals' conclusion in this case that petitioner's claims alleging a defect in a motor vehicle which complied with the applicable federal standard are expressly preempted by the Safety Act conflicts with the decisions of every federal court of appeals which has considered the issue. *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, 780-81 (3rd Cir. 1992); *Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257, 1264 (5th Cir. 1992); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1120-21 (3rd Cir. 1990), *cert. denied*, 498 U.S. 853 (1990); *Taylor v. General Motors Corp.*, 875 F.2d at 824-25; *Wood v. General Motors Corp.*, 865 F.2d 395, 407 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990). *See also*: *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990).

The court of appeals' finding of express preemption in this case was premised only on its interpretation of

§1392(d). The court did not specifically discuss the savings clause in §1397(k). However, by relying on its decision in *Boyle*, 177 Wis.2d at 218-19, 501 N.W.2d at 869-70, which held that §1397(k) does not preserve state law claims which conflict with the applicable federal safety standards, the court implicitly held that §1397(k) cannot serve to preclude the express preemption of common law claims.

In interpreting §1392(d) to support a finding of express preemption, the court of appeals failed to give due consideration to the well-established rule which presumes that the only state action which is preempted is that which Congress has clearly indicated to be preempted. *E.g., Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 715 (1985); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The federal courts of appeal have heeded that rule and held that the issue of express preemption under the Safety Act can be resolved only after considering §1392(d) together with §1397(k). Having done so, they concluded that the two provisions made ambiguous Congress' intent with respect to the preemption of common law claims and thus could not support a determination of express preemption. *Perry*, 957 F.2d at 1264; *Pokorny*, 902 F.2d at 1120; *Taylor*, 875 F.2d at 824; *Wood*, 865 F.2d at 402. *See also, Buzzard*, 966 F.2d at 780-81, relying on *Pokorny*. Two of those courts also found Congress' choice of the words "safety standard" significant, and reasoned that in the absence of some explicit reference to "common law," there was no basis for inferring that Congress intended §1392(d) to expressly preempt common law damage claims. *Pokorny*, 902 F.2d at 1121; *Taylor*, 875 F.2d at 824.

The First Circuit was the first federal appeals court to address the issue in *Wood*. In that case, the plaintiff sought to hold a vehicle manufacturer liable for failing to

install air bags. The court found the Safety Act to be "facially ambiguous" in a case alleging a design defect in a vehicle complying with FMVSS 208. 865 F.2d at 401. The court noted that the finding needed for the plaintiff to be successful on her design defect claim would be "tantamount to announcing a state safety standard," which, "if promulgated by state statute or regulation, would be preempted by the clear commands of section 1392(d)." *Id.* However, the court reasoned that §1397(c), which could not be ignored, arguably preserved a court's right to create such a standard even though it conflicted with the applicable federal standard. *Id.* The court concluded that §1397(c) made it impossible for the court to determine that §1392(d) expressly preempted a state tort action. The court reasoned:

> [G]iven Congress's failure to foresee [the problem present in this case], we are not persuaded that section 1392(d) can be construed to manifest an *express* intention to preempt state design lawsuits having the present effect. By the same token, we do not construe the general language of section 1397(c) as intended to preserve the narrow class of design lawsuits that give rise to a conflicting state safety standard.

(Emphasis in the original.) 865 F.2d at 402.

In *Taylor*, 875 F.2d at 824, which was factually similar to *Wood*, the Eleventh Circuit noted that §1392(d) conflicted with the savings clause, but rejected the argument that the savings clause "preserv[ed] common law liability only for those automobile safety defects that are not specifically addressed by a Safety Standard." The court reasoned that such an interpretation would render the savings clause redundant since the preemption clause itself states that if a federal standard does not govern "the same aspect of performance" as the state standard, the state standard is not preempted. *Id.* The court also

noted that the preemption clause does not refer to "common law," although Congress had used that term in other statutes:

> An additional factor militating against a finding that the language of the Safety Act expressly preempts appellants' claims is that Congress did not make explicit reference to state common law in the Act's preemption clause as it has in the preemption clauses of many other statutes. Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires. *See, e.g.*, Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §1715z-17(d), -18(e) (Supp.V 1987) (preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976, 17 U.S.C. §301(a) (1982) (preempting rights "under the common law or statutes of any State"); Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(a), (c)(1) (1982) (preempting all state "laws, decisions, rules, regulations, or other State action having the effect of law"). The absence of such an explicit reference to state common law in the Safety Act's preemption clause therefore counsels against a finding of express preemption.

875 F.2d at 824-25.

Because of the conflict between the language of §1392(d) and §1397(k) and Congress' failure to explicitly refer to "common law" in §1392(d), the court concluded that "the Safety Act cannot be construed as unambiguously manifesting an intention to preempt . . . common law claims." 875 F.2d at 824-25.

In *Pokorny*, 902 F.2d 1116, the plaintiff's van, which was equipped with manual lap-shoulder seat belts, was alleged to be defectively designed because it was not equipped with air bags, automatic seat belts, or protective

netting on the windows. The Third Circuit held that none of the plaintiff's claims was expressly preempted by the Safety Act, reasoning that "[t]he question of express preemption is properly analyzed only after considering both §1392(d) *and* §1397(k)." (Emphasis in the original.) 902 F.2d at 1120. Moreover, agreeing with *Taylor*, the court refused to interpret §1397(k) narrowly so that it would only apply to common law actions which were beyond the purview of the Safety Act, since such a construction would render the savings clause redundant. 902 F.2d at 1121. Finally, the Third Circuit noted "that §1392(d), the preemption provision, does not specifically mention common law liability." *Id.*

In *Perry*, 957 F.2d 1257, the plaintiff sought to hold the vehicle manufacturer liable for a defectively designed air bag system. Reading §1392(d) together with §1397(k), the Fifth Circuit held that Congress did not expressly preempt the plaintiff's claim. 957 F.2d at 1264.

In *Buzzard*, 966 F.2d 777, the plaintiffs claimed that a truck trailer which complied with the lighting requirements of FMVSS 108 had insufficient lighting or reflective devices. The Third Circuit relied on its interpretation of §1392(d) and §1397(k) in *Pokorny* and held that the claims were not expressly preempted by the Safety Act. 966 F.2d at 780-81.

The determination of the Wisconsin court that petitioner's claims are expressly preempted pursuant to §1392(d) obviously conflicts with the decisions of the federal circuit courts cited above. In failing to discuss §1397(k), except implicitly by its reliance on its decision in *Boyle*, where the statute was briefly discussed, the court of appeals ignored the principal factor on which the federal circuit courts relied in finding no express preemption.

Various state appellate courts have also concluded that §1392(d) does not expressly preempt claims based upon defects in motor vehicle restraint systems which complied with FMVSS 208. *Hyundai Motor Co. v. Phillip*, 639 So.2d at 1066; *Wilson v. Pleasant*, 645 N.E.2d 638, 641 (Ind.App. 1994); *Loulos v. Dick Smith Ford, Inc.*, 882 S.W.2d 149 (Mo.App. 1994); *Gingold v. Audi-NSU-Auto Union, A.G.*, 567 A.2d 312, 320-21 (Pa.Super. 1989); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570, 576 (Tex.App. 1993).

Federal district courts have reached the same conclusion in cases involving motor vehicle restraint systems. *Heath v. General Motors Corp.*, 756 F.Supp. 1144, 1147 (S.D.Ind. 1991); *Dallas v. General Motors Corp.*, 725 F.Supp. 902, 904-05 (W.D.Tex. 1989); *Kolbeck v. General Motors Corp.*, 702 F.Supp. 532, 536-38 (E.D.Pa. 1988); *Staggs v. Chrysler Corp.*, 678 F.Supp. 270, 272 (N.D.Ga. 1987); *Schick v. Chrysler Corp.*, 675 F.Supp. 1183, 1184 (D.S.D. 1987); *Garrett v. Ford Motor Co.*, 684 F.Supp. 407, 409 (D.Md. 1987); *Murphy v. Nissan Motor Corp.*, 650 F.Supp. 922, 925-26 (E.D.N.Y. 1987); *Baird v. General Motors Corp.*, 654 F.Supp. 28, 30 (N.D.Ohio 1986). The same conclusion has also been reached by federal district courts in cases involving an alleged defect in some other item of motor vehicle equipment. *Contant v. Kawasaki Motors Corp.*, 848 F.Supp. 170, 172-73 (M.D.Fla. 1994); *Byrnes v. Honda Motor Co., Ltd.*, 845 F.Supp. 875, 876-77 (S.D.Fla. 1994); *Jordan v. Paccar, Inc.*, 792 F.Supp. 545, 548 (N.D.Ohio 1992); *Richards v. Michelin Tire Corp.*, 786 F.Supp. 959, 962 (S.D.Ala. 1992); *Swope v. STI Transit Co.*, 796 F.Supp. 160, 162 (E.D.Pa. 1992); *Welsh v. Century Products, Inc.*, 745 F.Supp. 313, 317 (D.Md. 1990).

In finding express preemption, the court of appeals implicitly relied on its approval in *Boyle*, 177 Wis.2d at 218, 501 N.W.2d at 869, of three cases in which the courts

held that §1392(d) expressly preempts common law damage claims. *Vanover v. Ford Motor Co.*, 632 F.Supp. 1095, 1096-97 (E.D.Mo. 1986); *Cox v. Baltimore County*, 646 F.Supp. 761, 763 (D.Md. 1986); *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W.2d 838, 840 (Minn.Ct.App. 1987), *cert. denied*, 487 U.S. 1236 (1988). Those cases represent the minority view on this issue and their conclusion was rejected by the more recent federal court of appeals cases. *Taylor*, 875 F.2d at 824; *Pokorny*, 902 F.2d at 1120-21. *Vanover, Cox, Wickstrom, Wattelet v. Toyota Motor Co.*, 676 F.Supp. 1039 (D.Mont. 1987); *Montag v. Honda Motor Co., Ltd.*, 856 F.Supp. 574 (D.Colo. 1994); and *Miranda v. Fridman*, 647 A.2d 167 (N.J.Super. 1994), along with *Boyle* and this case, are the only cases in the country which have held that the Safety Act expressly preempts common law tort liability for motor vehicle defects.

II. THE WISCONSIN COURT OF APPEALS MISINTERPRETED *CIPOLLONE* AS PROVIDING SUPPORT FOR ITS FINDING OF EXPRESS PREEMPTION.

The court of appeals' conclusion in this case that imposition of liability on petitioner's common law claims would establish a state "safety standard" was based upon this Court's interpretation in *Cipollone* of section 5(b) of the Public Health Cigarette Smoking Act of 1969. That section provided:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

This Court noted that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that

take the form of common law rules," and concluded that the phrase "State law" would include the common law as well as statutes and regulations. 112 S.Ct. at 2620.

The interpretation of the preemption provision in *Cipollone* does not support the conclusion that §1392(d) preempts common law tort claims. The words in the statute in *Cipollone*, "requirement or prohibition . . . imposed under State law," are much broader that the term "safety standard" in §1392(d). Moreover, although *Cipollone* determined that the term "state law" includes common law, §1392(d) does not contain the terms "state law" or "common law". Given the presumption against preemption, the fact that the Court held that the phrase "no requirement or prohibition . . . imposed under State law" would encompass state common law does not lead to the conclusion that the term "safety standard" in §1392(d) includes common law. Also, the statute at issue in *Cipollone* did not have a savings clause.

The federal circuit courts' pre-*Cipollone* interpretation of §1392(d) and §1397(k) as supporting the conclusion that common law claims of motor vehicle defect are not expressly preempted by the Safety Act was not affected by this Court's interpretation in *Cipollone* of a different and more broadly worded preemption provision. Indeed, in *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *affirmed on other grounds, Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995), the Eleventh Circuit stated that its analysis of express preemption under §1392(d) in *Taylor* was "unchanged by *Cipollone*." 13 F.3d at 1521. Moreover, numerous state appellate court decisions, cited earlier, issued subsequent to *Cipollone* found no express preemption under the Safety Act. *Hyundai Motor Co. v. Phillip*; *Wilson v. Pleasant*; *Loulos v. Dick Smith Ford, Inc.*; *Marrs v. Ford Motor Co.*

The Wisconsin court's interpretation of *Cipollone* conflicts with these decisions.

III. OTHER STATES HAVE REJECTED EXPRESS PREEMPTION IN CASES INVOLVING IDENTICAL CLAIMS.

Petitioner's claims in this case are not the same as the claims in the so-called "no air bag" cases. This case involves a restraint system which had a passive shoulder harness, but no lap belt, and state courts in cases involving the same restraint system have found no express federal preemption.

This Court recently considered a petition for a writ of certiorari with regard to the decision of the Arizona Supreme Court in *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 884 P.2d 183 (1994), *vacated and remanded, Volkswagen of America, Inc. v. Hernandez-Gomez* (U.S. May 1, 1995) (No. 94-1305). In *Hernandez-Gomez*, the plaintiff's 1981 Volkswagen Rabbit flipped over and landed on its roof. The car was equipped with the same restraint system as in this case – the automatic shoulder harness attached to the door, but no manual or automatic lap belt. The plaintiff claimed that the absence of a lap belt made the car defective and unreasonably dangerous. Defendant VW claimed that the plaintiff's claims were preempted by the Safety Act. The Supreme Court of Arizona, construing the preemption and savings clauses of the Safety Act together, concluded that there was no express preemption, and, following *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *affirmed on other grounds, Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995), went on to find that since the text of the Safety Act provided a reliable indicium of Congressional intent with regard to preemption, the rule of *Cipollone* ended the need to infer

or imply Congressional intent to preempt. VW petitioned this Court for a writ of certiorari. This Court granted VW's petition and vacated the judgment and remanded the case to the Supreme Court of Arizona for further consideration in light of this Court's decision in *Freightlinger Corp. v. Myrick* to the effect that *Cipollone* did not establish a rule that implied preemption analysis is precluded by the presence of an express preemption clause. Thus, the indication is that on remand, the Arizona Supreme Court is to readdress the question of implied preemption. There is every reason to believe that the Arizona Supreme Court's conclusion that there was no express preemption will be unchanged after a decision on remand is rendered.

In *Hyundai Motor Co. v. Phillip*, 639 So.2d 1064 (Fla. App. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 901 (1995), the plaintiff claimed negligence and strict liability in the design of the 1988 Hyundai Excel restraint system, which is identical to the restraint system involved in this case – the automatic two-point shoulder harness without a lap belt. Hyundai contended that the Safety Act preempted the plaintiff's claim that the car was defective because of the lack of a lap belt. The Third District Court of Appeal of Florida disagreed, relying on *Perry*, *Taylor* and *Wood*. On January 17, 1995, this Court denied Hyundai's petition for a writ of certiorari.

Therefore, in identical cases, the rule on the question of federal preemption in Wisconsin is in direct conflict with rulings in the states of Arizona and Florida. If petitioner lived in Florida or Arizona, her claims would not have been found to be expressly preempted by federal law, but because she lives and was injured in Wisconsin, her claims were found to be expressly preempted. In order that citizens of the various states are treated the

same under the federal law, this Court should review the Wisconsin court's decision.

IV. THE COURT OF APPEALS' DECISION CONFLICTS WITH ITS OWN DECISION IN *DERBY*.

Two months before it issued its opinion in this case, the court of appeals issued its opinion in *Derby v. Brenner Tank, Inc.*, 187 Wis.2d 244, 522 N.W.2d 274. The court's interpretation of §1392(d) in *Derby* conflicts with its interpretation of that statute in this case.

In *Derby*, claims were brought against the manufacturer of a trailer based upon the failure to equip the trailer with reflective tape. The lighting and reflectors on the trailer complied with FMVSS 108. The court of appeals held that the plaintiffs' claims were not expressly or impliedly preempted by the Safety Act. The court relied on *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777, which also involved a claim that a truck trailer which complied with FMVSS 108 had insufficient lighting or reflective devices. In *Buzzard*, the Third Circuit determined that the claim was not expressly preempted by the Safety Act, relying on its interpretation of §1392(d) and §1397(k) in *Pokorny*, 902 F.2d at 1121. *Buzzard*, 966 F.2d at 780-81.

In *Derby*, 187 Wis.2d at 249-50, 522 N.W.2d at 276, the Wisconsin court agreed with *Buzzard*'s interpretation of §1392(d) and §1397(k), which was based on *Pokorny*:

> *Buzzard* concluded that Congress did not preempt state common-law by explicit language . . . , noting that the Safety Act has both a preemption clause, §1392(d), and a savings clause, §1397(k). *Buzzard*, 966 F.2d at 780. *Buzzard* refused to construe the savings clause so narrowly that it would apply only to common-

> law actions wholly beyond the Safety Act's purview, motor vehicle safety equipment, because it would deprive the savings clause of any practical effect. *Id.* at 780-81.

The court of appeals' decisions in *Derby* and this case are obviously in conflict. In *Derby* the court rejected a limited construction of the savings clause in §1397(k) and construed it together with the preemption clause in §1392(d). In this case and in *Boyle*, the court did the opposite, finding that the term "safety standard" in the preemption clause was broad enough to encompass common law claims, and that the savings clause only applied to claims that do not conflict with the federal safety standards. In this case and *Boyle*, the court rejected *Pokorny's* analysis of the statutes with regard to the express preemption issue, but in *Derby* the court embraced that analysis by relying on *Buzzard* which was based on *Pokorny*.

The court of appeals in this case held that it was justified in reaching a conclusion which differed from its conclusion in *Derby*, because the cases involved different federal motor vehicle safety standards. (App. 7-App. 8, fn. 4) However, the difference in the type of safety standard involved did not warrant the court in construing §1392(d) and §1397(k) in two different ways.

Resolution of the express preemption issue depends initially upon whether imposition of state common law liability results in the establishment of a state "safety standard" as set forth in §1392(d) and whether that claim is "saved" by the savings clause in §1397(k). The interpretation of these statutes should be the same regardless of the specific federal safety standard involved.

This is demonstrated by the Third Circuit's decisions in *Pokorny* and *Buzzard*. *Pokorny* involved FMVSS 208 and *Buzzard* involved FMVSS 108. Yet, the court in *Buzzard*

held that its reasoning regarding express preemption in *Pokorny* was applicable. *Buzzard*, 966 F.2d at 780-81.

Therefore, there is no justification for the conflicting decisions in this case and *Derby*, and the attempt to distinguish the cases based on different safety standards simply compounds the Wisconsin court's conflict with the federal circuit court decisions.

V. EXPRESS PREEMPTION IS THE ONLY ISSUE PRESENTED; THE ISSUE OF IMPLIED PREEMPTION MAY BE REMANDED TO THE WISCONSIN COURT.

The affirmance of the dismissal of petitioner's claims was based solely upon the Wisconsin court's finding of express preemption under the Safety Act. Having found express preemption, the court did not address the issue of whether the claims were impliedly preempted. Therefore, only the sharply defined issue of express preemption under the statutory interpretation of the language of the Safety Act is presented.

The key questions in the statutory interpretation of the Act are: (1) whether the term "safety standard" in 15 U.S.C. §1392(d) includes only statutes and regulations, but not common law, and (2) whether the savings clause, §1397(k), does not permit a manufacturer to use a federal safety standard to immunize itself from state common-law liability. The group of citizens and litigants who are deeply enmeshed in the issues of automotive litigation anticipated that these questions might be decided in *Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483, but they were not because ultimately it turned out that in *Myrick* those questions were not presented in the right context. In this case, these two issues are squarely presented.

Also, the question of implied preemption is not presented, because the Wisconsin court did not address it. Although this Court could address the issue of implied preemption, since it is purely a question of law which would be reviewed *de novo*, in the event the Court rejects the finding of express preemption, the matter could be remanded to the Court of Appeals of Wisconsin for determination of the issue of implied preemption.

There would be some merit to remanding the issue of implied preemption, because:

> (1) There is no decision under Wisconsin law on the subject of implied preemption of defect claims specifically like those raised in this case, and
>
> (2) If this Court were to conclude that the term "safety standard" in the preemption clause in §1392(d) does not include common law claims and judgments and/or that the savings clause of §1397(k) does not permit the manufacturer to use a federal safety standard to immunize itself from state common-law liability, then the landscape of implied preemption analysis under the Safety Act would be changed.

Although the Wisconsin court held that its "holding in *Boyle* controls the disposition of this case," (App. 7) and although in *Boyle* the court found implied preemption, one cannot leap to the conclusion that by relying on *Boyle*, the Wisconsin court would necessarily determine that petitioner's claims in this case are impliedly preempted. Such a conclusion is foreclosed by the fact that the claims in this case are different from the claims in *Boyle*.

In *Boyle*, the plaintiff's claim was based upon the manufacturer's failure to install air bags and passive

restraints. It was that claim which was found to be impliedly preempted. *Boyle*, 177 Wis.2d at 220, 501 N.W.2d at 870.

In this case, petitioner claimed that the VW Rabbit was defective because the VWRA restraint system failed to provide adequate pelvic restraint, including a manual lap belt. An implied preemption analysis would require a determination of whether imposing liability on VW for failing to provide adequate pelvic restraint or install a lap belt would conflict with the federal law. No such analysis was made by the court of appeals in either *Boyle* or this case. *Boyle's* conclusion as to implied preemption of passive restraint claims is not applicable to *all* claims involving any type of motor vehicle restraint. *See, e.g., Perry v. Mercedes Benz of North America, Inc.*, (claim that air bag system which complied with federal standards was defective because the deceleration rate triggering its deployment should have been lower was not impliedly preempted, although claim for lack of air bag was); *Pokorny v. Ford Motor Co.* (claim that car should have had protective window netting to prevent ejection was not impliedly preempted, although claim for lack of air bag was). Petitioner's claim here is similar to the claims in *Perry* and *Pokorny* which would merely have required the manufacturer to exceed the federal minimum standards.

Also, any implied preemption analysis will be affected by this Court's interpretation of the term "safety standard" in the preemption clause and its interpretation of the effect of the savings clause. In *Freightliner Corp. v. Myrick*, 514 U.S. at ___, 115 S.Ct. at 1488, the Court indicated that there is an inference that an express preemption clause could foreclose implied preemption. Whether implied preemption is foreclosed under the Safety Act, therefore, depends to some degree on this

Court's instruction as to the scope of express preemption under the Safety Act.

Based on all of the above, therefore, the Wisconsin court's finding of express preemption presents the perfect opportunity for this Court to resolve the conflicts concerning the statutory interpretation of the Safety Act's preemption clause and savings clause.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

Page

Opinion of the Court of Appeals of Wisconsin, dated November 8, 1994 ..... App. 1

Partial transcript of decision of the Circuit Court for Milwaukee County on August 26, 1991, regarding motion to strike affirmative defense based upon federal preemption ..... App. 10

Order of the Circuit Court for Milwaukee County striking the defendants' affirmative defense based on federal preemption, dated September 10, 1991 ..... App. 15

Transcript of decision of the Circuit Court for Milwaukee County on August 25, 1992, regarding motion to dismiss ..... App. 19

Judgment of the Circuit Court for Milwaukee County, dated April 1, 1993 ..... App. 25

Order of the Wisconsin Supreme Court dated February 21, 1995, denying a petition for review of the opinion of the Court of Appeals of Wisconsin ..... App. 28

Judgment of the Court of Appeals of Wisconsin, dated February 23, 1995 ..... App. 30

Judgment of the Court of Appeals of Wisconsin, dated February 23, 1995 ..... App. 32

49 C.F.R. § 571.208 S4.1.2 ..... App. 34

COURT OF APPEALS
DECISION
DATED AND RELEASED

November 08, 1994

Nos. 93-1341
93-2579

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

ERIN DYKEMA,

Plaintiff-Appellant-Cross Respondent,

v.

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation,

Defendants-Respondents-Cross Appellants,

STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants-Respondents.

ERIN DYKEMA,

Plaintiff-Appellant,

v.

VOLKSWAGENWERK AG, a foreign corporation, and VOLKSWAGEN OF AMERICA, INC., a foreign corporation,

Defendants-Respondents,

STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

APPEAL and CROSS-APPEAL from judgments of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Fine, JJ.

SULLIVAN, J. Erin Dykema appeals from judgments,[1] after a jury trial, dismissing her causes of action against Volkswagenwerk AG, and Volkswagen of America, Inc. (collectively, "VW"), for common law and strict liability negligence resulting in the personal injuries she received in a one-automobile collision. VW cross-appeals from the judgments.

Dykema presents one issue for our review: whether the trial court erroneously exercised its discretion when it denied Dykema's post-verdict motion for a new trial because of alleged jury contamination and misconduct. On cross-appeal, VW argues that the trial court erred when it failed to dismiss Dykema's causes of action based upon federal preemption by Section 1392(d) of the Federal Motor Vehicle Safety Act of 1966, and Federal Motor Vehicle Safety Standard 208. Because we conclude that Dykema's causes of action were federally preempted, we

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[1] In Case No. 93-1341, Dykema appeals from a final judgment entered on April 1, 1993, dismissing her complaint and awarding VW $51,730.07 in costs. On September 24, 1993, the trial court issued an amended judgment reducing the previously awarded costs to $46,881.14. In Case No. 93-2579, Dykema appeals from the amended judgment. Pursuant to our order on October 21, 1993, Case Nos. 93-1341 and 93-2579 were consolidated for purposes of appeal. The briefs in Case No. 93-1341 were allowed to stand as the briefs in Case No. 93-2579, pursuant to our orders on January 3, 1994, and March 28, 1994. Thus, the issues raised in both cases are identical.

affirm the trial court's judgments that dismissed the actions.[2]

Dykema was rendered a quadriplegic on April 16, 1988, when the 1978 Volkswagen Rabbit, in which she was the driver and sole occupant, left the road and rolled over. No other vehicles were involved in the collision. The Rabbit was equipped with a passive-restraint system that featured a two-point body restraint, a knee bar, and a ramped seat. The system, known as the VWRA, was automatically engaged when drivers positioned themselves in the seat.

At trial, Dykema argued that the restraint system would have been safer if it had been equipped with a manual lap belt. Expository of her position, she presented Dr. Kenneth Saczalski, an expert in accident reconstruction and body kinematics, who testified that the VWRA is "basically an incomplete restraint system. They [VW] just didn't finish the job. They didn't put in the lap belt. In my opinion, that is what caused the injuries."

At the conclusion of Dykema's case-in-chief, VW moved the court for a dismissal, arguing that federal preemption deprived the state courts of subject matter jurisdiction. VW argued that Dykema's claims relating to the alleged lack of reasonably adequate lower pelvic restraint in the VWRA system were preempted by federal

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[2] Because we conclude federal law preempts Dykema's causes of action, we do not address the issue of alleged jury contamination and misconduct presented in Dykema's appeal. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

law governing automobile safety standards. The trial court denied VW's motion, stating:

> Plaintiff's claim is not impliedly preempted by the Safety Act. The addition of a lap belt or other type of torso restraint wouldn't conflict with the federal standards, but would supplement them. The compensation of victims, a function of state law, sets it apart from direct forms of regulations and a manufacturer may choose a variety of actions to avoid liability or lessen its impact. Common law is not regulation.

At the conclusion of the eight-week trial, the jury found that the 1978 Volkswagen Rabbit was not defectively designed and that VW was not negligent. The trial court entered a judgment dismissing Dykema's complaint. Dykema appeals this judgment and VW cross-appeals.

VW argues that, as a matter of law, Dykema's strict liability and negligence claims were federally preempted and, therefore, the trial court erred when it denied VW's motion to dismiss at the close of Dykema's case-in-chief. We agree.

Federal preemption of a matter deprives a state court of subject matter jurisdiction. ***Mulhern v. Outboard Marine Corp.***, 146 Wis.2d 604, 614, 432 N.W.2d 130, 134 (Ct. App. 1988). Whether a court has subject matter jurisdiction is a legal issue for which we accord no deference to the conclusions of the trial court. *See* ***Gonzales v. AM Community Credit Union***, 150 Wis.2d 773, 777, 442 N.W.2d 536, 537 (Ct. App. 1989).

In 1966, Congress determined that because of the "centralized, mass production, high volume character" of the manufacture of automobiles, the nation required

safety standards that were uniformly enforced. S. REP. No. 1301, 89th Cong., 2d Sess. 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. Congress concluded that the "primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. REP. No. 1301, at 4, *reprinted in* 1966 U.S.C.C.A.N. at 2712.

Accordingly, Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 15 U.S.C. § 1381, *et. seq.*, that directed that United States Department of Transportation and its sub-agency, the National Highway Traffic Safety Administration (NHTSA), to issue federal motor vehicle safety standards. The Safety Act provides for the supremacy of these federal standards and declares, in part, that:

> Whenever a Federal motor vehicle safety standard established under this title is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d).

Pursuant to the Safety Act, NHTSA promulgated Federal Motor Vehicle Safety Standard 208 (FMVSS 208) that regulated motor vehicle occupant crash protection. 49 C.F.R. 571.208. FMVSS 208 requires all passenger cars manufactured between September 1, 1973, and September 1, 1986, to possess one of three types of crash protection: (1) passive restraints for all crashes; (2) passive restraints

for head-on crashes plus manual belts; or (3) manual three-point seat belts. 49 C.F.R. § 571.208, S4.1.2.1-3. Additionally, FMVSS 208 states that a manufacturer could install an automatic belt "that requires no action by vehicle occupants" to meet the standards of § 571.208, S4, and in place of the "seat belt assembly" required by option S4.1.2.2. 49 C.F.R. § 571.208, S4.5.3. NHTSA, in 1974, ruled that the VWRA system at issue in this case was an authorized means to comply with FMVSS 208's second option. 39 Fed. Reg. 3834 (1974).

Throughout the pretrial motions, the trial, and on appeal, Dykema has never argued that the VWRA system did not comply with the requirements of FMVSS 208. Indeed, at oral argument, Dykema stated that she did not dispute the fact that the VWRA complied with the standard. Dykema argues, however, that the VWRA provides inadequate lower pelvic restraint and, therefore, a state tort claim is a valid action to redress her injuries. VW argues that state common-law tort claims are preempted by 15 U.S.C. § 1392(d) if they require a non-identical safety standard to that under FMVSS 208.

We recently addressed this contention, albeit in a slightly different form, in ***Boyle v. Chrysler Corp.***, 177 Wis.2d 207, 501 N.W.2d 865 (Ct. App. 1993). In ***Boyle***, we stated: "[W]e conclude that compliance with the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381 (1982), and the Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 (1979) . . . preempt[s] state law claims based on the absence of airbags or other passive restraints. . . . " ***Id.*** at 213, 501 N.W.2d at 867.

Accordingly, contrary to Dykema's attempts at oral argument and in her appellate briefs to distinguish the applicability of ***Boyle*** solely to "absence of airbag cases,"[3] we conclude that our holding in ***Boyle*** controls the disposition of this case.[4]

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[3] We note that other jurisdictions have reached divergent conclusions regarding federal preemption of state common-law claims under 15 U.S.C. § 1392. *See* ***Myrick v. Fruehauf Corp.,*** 13 F.3d 1516 (11th Cir.) (holding state common-law claims for failure to install anti-lock brakes in tractor-trailer truck are not preempted by National Traffic and Motor Vehicle Safety Act (the "Safety Act")), *cert. granted sub nom.,* ***Freightliner Corp. v. Myrick,*** 63 U.S.L.W. 3282, 63 U.S.L.W. 3291 (U.S. Oct. 7, 1994) (No. 94-286); ***Perry v. Mercedes Benz of North America, Inc.,*** 957 F.2d 1257 (5th Cir. 1992) (declaring state claims that are based on defective design of automobile airbags are not preempted by the Safety Act); ***Pokorny v. Ford Motor Co.,*** 902 F.2d 1116 (3d Cir.) (holding state claim that van was defectively designed because it was not equipped with airbags or automatic seat belts was impliedly preempted, but claim that van was defective because it lacked protective netting over windows was not preempted), *cert. denied,* 498 U.S. 853 (1990); ***Estate of Montag v. Honda Motor Co.,*** 856 F. Supp. 574 (D. Colo. 1994) (finding state claim for failure to install airbags is federally preempted by the Safety Act); ***Richards v. Michelin Tire Corp.,*** 786 F. Supp. 959 (S.D. Ala. 1992) (finding state claim against tire manufacturer for failure to warn is not preempted by the Safety Act); ***Loulos v. Dick Smith Ford, Inc.,*** 882 S.W.2d 149 (Mo. Ct. App. 1994) (holding state claim for failure to equip automobile with airbag is not preempted by the Safety Act).

[4] Subsequent to oral argument in this case, a different panel of this court released ***Derby v. Brenner Tank, Inc.,*** No. 93-3466 (Ct. App. Aug. 30, 1994) (ordered published on September 27, 1994), that concluded 15 U.S.C. § 1392 did not federally preempt state common-law claims based on standards differing from Federal Motor Vehicle Safety Standard 108, 49 C.F.R. § 571.108, which regulated illumination on tractor-trailer trucks. ***Id.,*** slip

The VWRA system with which VW elected to equip the 1978 Volkswagen Rabbit complies with the requirements of FMVSS 208, and therefore "is within the purview of the explicit preemption provision prohibiting states from requiring different restraints." *Id.* at 217, 501 N.W.2d at 869. Thus, Dykema's claims, which were based upon VW's alleged failure to provide reasonable adequate lower pelvic restraint, would establish a different safety standard from that required by federal law. *Boyle* specifically states that such claims are preempted. *Id; see Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992) (holding that for purposes of federal preemption, state law includes statutes, regulations, *and* common-law actions).

Accordingly, we conclude that the holding and analysis in *Boyle* controls and, therefore, the trial court erred when it failed to dismiss Dykema's action based on its lack of subject matter jurisdiction to hear the matter. However, because the trial court did dismiss Dykema's

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op. at 2. We conclude that nothing in *Derby* conflicts with our conclusion that *Boyle v. Chrysler Corp.*, 177 Wis.2d 207, 501 N.W.2d 865 (Ct. App. 1993), controls the disposition of this case.

As stated in *Derby*: "[T]he legislative history of the Safety Act demonstrates congressional intent to exclusively occupy the field insofar as Standard 208 permits manufacturers one of three options in order to prevent states from prematurely making air bags or automatic seat belts mandatory." *Derby*, slip op. at 6. We conclude that while other standards promulgated under the Safety Act may not evince congressional intent for federal preemption, FMVSS 208 does evince such intent, and thus, *Derby's* holding as to FMVSS 108 has no effect on our conclusion in this case.

complaint after the jury found in favor of VW, we affirm the post-verdict judgments that dismissed the complaint.

By the Court. – Judgments affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN: CIRCUIT COURT : Branch 16 MILWAUKEE COUNTY

ERIN DYKEMA, DALE DYKEMA, and JANE DYKEMA,

Plaintiffs,

-vs-

Case No. 89-CV-15890

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation, HEISER TOYOTA, INC., a Wisconsin corporation, AMERICAN HARDWARE MUTUAL INS. CO., a foreign corporation, STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

August 26, 1991,

HON. WILLIAM D. GARDNER
Circuit Judge, presiding.

DECISION

APPEARANCES:

HABUSH, HABUSH & DAVIS by MARK S. YOUNG, ESQ., appeared on behalf of the plaintiffs.

HINSHAW & CULBERTSON, by JEFFREY S. FERTL, ESQ., and FRANK SCHERKENBACH, ESQ., appeared on behalf of defendants Volkswagenwerk AG and Volkswagen of America, Inc.

RIORDAN, CRIVELLO, CARLSON, MENTKOWSKI & STEEVES, S.C., by ANNA M. PEPELNJAK, ESQ., appeared on behalf of defendants Heiser Toyota, Inc. and American Hardware Mutual.

Official Reporter – Joanna Koepp.

TRANSCRIPT OF PROCEEDNGS

THE CLERK: Erin Dykema versus Volkswagen et al., 89 CV 015890, motion to strike.

THE COURT: May I have appearances please?

MR. YOUNG: Representing the plaintiffs, my name is Mark S. Young.

MR. FERTL: On behalf of Volkswagen of America and Volkswagenwerk AG, Frank A. Scherkenbach and Jeffrey S. Fertl with Hinshaw and Culbertson.

MS. PEPELNJAK: Anna Pepelnjak appears on behalf of Heiser Toyota and American Hardware Mutual Insurance Company.

* * *

The matter before the Court today is the motion to strike affirmative defenses particularly as they relate to VWAG and VWOA, and also implied in some instances as to Toyota.

This motion to strike the affirmative defenses was timely made, and the Court considers the motion. The motion was filed within twenty days after defendant's responsive pleadings and well within the scheduling order time restraints. So I'm going to consider it.

* * *

The 8th Affirmative Defense of VWAG and VWOA alleges that Plaintiffs' negligence and strict liability claims predicated upon alleged inadequacies in the subject vehicle's restraint system are pre-empted by Federal Law. In this respect I thank counsel for all the law they submitted to me, and I read every bit of it. Found it, as I anticipated, a very very interesting question.

This Court is of the opinion that presumption be [sic] Federal Law invading as it does the sovereignty of the State ought not to be lightly presumed or easily found. The savings clause of the National Traffic and Motor Vehicle Act at 15 USC section 1397 (c) specifically provides that compliance with the Federal standards does not exempt any person from common law liability.

The rationale of Gingold versus Audi at 567 Atlanta 2d 312 is persuasive, although not controlling. The Court recognizing that is a Pennsylvania case. Federal regulations may have the same effect as Federal statutes. The underlying and critical question is whether Congress intended that Federal regulations supersede State law.

One need go no further than the clear language of 15 USC 1397 (c) to determine intent. Had Congress meant to pre-empt the claim before us, it could have done so and did not. VW's argument would negate any cause for

inclusion of 1397 (c) in the regulatory scheme, and one must assume a purpose and intent in its very existence. If one found it necessary to examine intent, the Congressional Record would support this Court's determination if that is the intent of Congress.

It must be remembered that Plaintiffs' claim is that Defendant's product was defectively designed. The question is not whether the vehicle did or did not have air bags or other passive restraints, but whether the vehicle was defectively designed. There was no attempt by the pleadings here to establish a new safety standard or to find Defendants liable for selecting one NASTA [sic] standard rather than another.

The Defendants' reliance on Comonwealth [sic] versus Johnson at 507 PA 27, 1985 case, as holding that Gingold is no longer persuasive in Pennsylvania since the Third Federal Circuit had held passive restraint claims were pre-empted, is incorrect in two respects.

First, Johnson held that a Third Circuit decision may be instructive. But Johnson did not reach the question of being bound by any Third Circuit decision. If you'll note the fact they use the words in there we disagree, and they went back to Smith versus Comonwealth [sic].

Johnson disagreed and did not reach the question of whether they were bound by it. And, secondly, the instant case, that is the case before us of Dykema, is not an air bag or passive restraining issue but defective design.

The Court is aware, as argued by defendant, that there was no question of implied presumption arising, Arbet versus Gussarson, 66 Wis. 2d 551 '75. But the Court is persuaded of the reliability of the logic there and citing 15 US Code Section 1397 (c). Arbet stated, "Thus Congress felt that Federal regulation should be supplementary to the common law products liability. Defendants' argument that problem of automobile design is exclusively legislative must therefore be rejected.

The asserted defense is not legally sufficient as a matter of law, and VWAG and VWOA's 8th affirmative defense is also stricken.

* * *

That's the Order of the Court.

MR. YOUNG: Thank you, Your Honor.

THE COURT: Mr. Young, you'll prepare an Order.

MR. YOUNG: I'd be happy to do that.

* * *

STATE OF WISCONSIN: CIRCUIT COURT : Branch 16 MILWAUKEE COUNTY

ERIN DYKEMA, DALE DYKEMA, and JANE DYKEMA,

Plaintiffs,

vs. Case No. 89-CV-15890

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation, HEISER TOYOTA, INC., a Wisconsin corporation, AMERICAN HARDWARE MUTUAL INS. CO., a foreign corporation, STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

ORDER

The plaintiffs' Motion to Strike Affirmative Defenses having come on for hearing on August 26, 1991, and the plaintiffs having appeared by Mark S. Young, and the defendants Volkswagenwerk AG (VWAG) and Volkswagen of America, Inc., (VWOA) having appeared by Frank A. Scherkenbach and Jeffery S. Fertl, and the defendants Heiser Toyota, Inc., (Heiser) and American Hardware Mutual Insurance Company (American) having appeared by Anna M. Pepelnjak, and the court having considered the briefs, submissions and arguments of counsel, and the court being otherwise fully apprised in the premises, the court makes the following orders:

1. The plaintiffs' Fourth Amended Complaint has been properly served upon the defendants, and Affirmative Defense No. 11 in the Answer of VWOA and VWAG to the Fourth Amended Complaint, ("that there has been improper process and improper service of process upon VWAG insofar as the Complaint contains a claim for punitive damages which has not been personally served upon VWAG as required by the Hague Convention and German law"), is hereby stricken.

2. Affirmative Defense No. 12 in the Answer of VWOA and VWAG to the Fourth Amended Complaint, ("that plaintiffs have waived or are estopped from asserting any claims, causes of action, or demands for punitive damages since said claims, causes of action or demands, which were contained in the plaintiffs' original pleading and Second Amended Complaint, were voluntarily dropped by plaintiffs when they filed and served their Third Amended Complaint"), is hereby stricken.

3. Affirmative Defense No. 9 in the Answer of VWOA and VWAG to the Plaintiffs' Fourth Amended Complaint, ("that the plaintiffs' claims for punitive damages are violative of the due process clause of the Fourteenth Amendment of the United States Constitution as well as the Constitution of the State of Wisconsin"), is hereby stricken.

4. Plaintiffs' Motion to Strike Affirmative Defense No. 7 in the Answer of VWOA and VWAG to the Fourth Amended Complaint, ("that the defendants, VWOA and VWAG, sustain no liability for the product in question as it was clearly misused, abused and substantially changed at the time of the alleged occurrence"), is denied.

5. Affirmative Defense No. 8 in the Answer of VWOA and VWAG to the Fourth Amended Complaint, ("that plaintiffs' negligence and strict liability claims predicated upon alleged inadequacy of the subject vehicle's restraint system are preempted by federal law"), is hereby stricken.

6. The Plaintiffs' Motion to Strike the Affirmative Defense stated in Paragraph 19 of the Answer of Heiser and American to the Plaintiffs' Complaint, which is incorporated by reference into the Answer of Heiser and American to the Fourth Amended Complaint, ("that certain claims within the plaintiffs' Complaint fail to state a claim upon which relief can be granted"), is denied, and the court will allow the plaintiffs to renew their motion to strike such affirmative defense if clarification is obtained from Heiser and American as to which claims said affirmative defense is directed.

7. The Plaintiffs' Motion to Strike the affirmative defense stated in paragraph 22 of the answer of Heiser and American to the plaintiffs' Complaint, which has been incorporated by reference into Heiser and American's answer to the Fourth Amended Complaint, in which Heiser and American "incorporate all applicable affirmative defenses raised by other defendants to this action" is granted with respect to those affirmative defenses of VWOA and VWAG which are hereby stricken in the preceding paragraphs of this order.

8. This case is removed from the trial calendar for November 11, 1991 and January 13, 1992.

9. This case is scheduled as the number 1 case set for trial commencing on July 13, 1991 at 1:30 p.m.

Dated at Milwaukee, Wisconsin, this ___ day of SEP 10 1991, 1991.

BY THE COURT:

HON. WILLIAM D. GARDNER
The Honorable William D. Gardner

Id: 30967

STATE OF WISCONSIN: | CIRCUIT COURT : Branch 16 | MILWAUKEE COUNTY

ERIN DYKEMA, DALE DYKEMA, and JANE DYKEMA,

Plaintiffs,

-vs-

Case No. 89-CV-15890

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation, STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

August 25, 1992
Volume 27, A.M.

HON. WILLIAM D. GARDNER,
Circuit Judge, presiding.

JURY TRIAL

APPEARANCES:

HABUSH, HABUSH & DAVIS by MARK S. YOUNG, appeared on behalf of the plaintiffs.

HINSHAW & CULBERTSON, by FRANK A. SCHERKENBACH, JEFFERY S. FERTL, appeared on behalf of defendants Volkswagenwerk AG and Volkswagen of American [sic], Inc.

* * *

MORNING SESSION

(Whereupon, the following proceedings were had outside the presence of the jury)

THE COURT: Yesterday morning I had the court reporter call counsel to verbally inform counsel that I had denied defendant's motion so that you might be prepared to proceed today. This morning I'm going to read the rationale behind my decision.

This Court has previously held, and plaintiff does not now dispute, that the VWRA system complied with FMVSS 208. The question before the Court at this juncture is whether defendant may be held liable under State tort law where defendant exercised an option permitted by FMVSS 208. This Court has read and studied all briefs and law submitted by all the parties and affirms its pre-trial bench decision of August 26 of 1991, with respect to the preemption issue.

This Court has considered developments since the time of decision, especially Cipollone versus Leggett [sic] Group Inc. at 112 Supreme Court 2608 (1992) decision. I do not read Cipollone as extinguishing the concept of implied preemption. I do read it as instructive in analyzing the concept of implied preemption generally agreeing with Justices Blackmun and Scalia who separately bemoaned the difficulty lower courts would encounter in attempting to implement Cippolone [sic].

It is clear that the intent of Congress is the touchstone in considering preemption whether it be express,

inferred or implied. The intent of Congress, in my judgment, should be found, if found at all, in the clear meaning of the words used in the legislation or regulation.

This Court's reading of Section 1392 (d) which in its title includes the words "Supremacy of Federal Standards," states, "No State – skip words throughout – shall have any authority . . . to establish . . . any safety standard not identical to the Federal standard." A plain reading of these words lead [sic] the Court to believe that the Federal regulation precluded Wisconsin from enacting any conflicting standards. I believe and hold that such language does not relate to common law actions but to state statutes and regulations. Standards are not imposed by verdicts in tort actions. Note the distinction made by the lead opinion in Cippolone [sic] in discussing the words "no statement" as contrasted to "no requirement or prohibition."

In my judgment it was not the intent of Congress to preempt the common law tort action. This interpretation is consistent with and justifies the existence of the savings clause section 1397 (c) which provides that "compliance with any Federal Motor Vehicle standard issued under this subchapter does not exempt any person from any liability under common law." The suggestion by defendant that the savings clause related only to field preemption and not conflict preemption does not withstand scrutiny. The preemption intended by the legislation is found in Section 1392 (d) and to so restrict 1397 (c) is to misinterpret its plain meaning, a meaning which must be analyzed to be the intent of Congress to say what

it meant. This determination by the Court is also consistent with the statement in Arbet versus Gussarson, 66 Wisconsin 2d 551, a 1975 case.

"Thus Congress felt that Federal regulation should be supplementary to the common law products liability. Defendants' argument that the problem of automotive design is exclusively legislative must therefore be rejected."

The expressions of intent found in the Congressional Record also support the concept that it was intended that tort claims for negligent or defective design survived the enactment of the Safety Act. The Amendment of the Safety Act in 1991 related solely to intent of Congress not to change those decisions relating to inflatable restraints, an option which, by the way, was found not to be expressly preempted by the Safety Act. And those four were called air bag cases. Notably, Porkorny [sic] finds no implied preemption of the addition of safety nets, so I look at those as specifically air bag cases.

There's no question here nor has any been raised that there's any inferred preemption, but I thought I would discuss the question of implied preemption. This Court is not unmindful that damage and tort claims in State courts can affect manufacturers who have complied with Federal Regulations in their design of restraint systems. In the present case, it is clear that plaintiffs' case rests primarily on the lack of lower torso restraint, a lack that could be rectified by the installation of a manual belt according to plaintiffs' witnesses.

Since plaintiffs' [sic] are not required by law to prove an alternative safety design, citing Sumnicht, this cannot

be characterized as a "no lap belt" case. Plaintiffs' witnesses have testified that the VWRA system is defective in design and that a lap belt would have overcome the defect. Other designs may have been available that would have cured the defect, but it is not the burden of plaintiff to prove the alternative.

Plaintiffs' claim is not impliedly preempted by the Safety Act. The addition of a lap belt or other type of torso restraint wouldn't conflict with the Federal Standards but would supplement them. The compensation of victims, a function of state law, sets it apart from direct forms of regulations, and a manufacturer may choose a variety of actions to avoid liability or lessen its impact. Common law is not regulation. Sort of a distillation of what Justice Blackmun said in Cippolone [sic].

This Court is aware that its decision cannot be reconciled with O'Bryan versus VWRA [sic] and VWAG, the August 1992 decision of Charles Simpson, United States District Judge for the Western District of Kentucky. That case is not precedent for this case. It does not consider Wisconsin law and found essentially O'Bryan's claim would frustrate the federal administrative scheme.

I, to the contrary, find no such frustration. I find that the stated purpose of the Safety Act first and foremost was the safety of the consumer. Uniformity in my judgment was a goal only as to the standards.

The motion is denied.

Yes?

MR. YOUNG: Just want to make one comment for the record. I think in the first sentence you indicated

that we do not dispute that the system complies with 208. We have made record of our dispute on that issue. We do not dispute that is the law of this case based on your decision at this stage.

THE COURT: The way I said it, it does not now dispute.

MR. YOUNG: I didn't hear the now.

THE COURT: Yeah. I meant for this decision you didn't dispute it.

MR. YOUNG: We acknowledge you made that the law of this case, Your Honor.

* * *

STATE OF WISCONSIN | CIRCUIT COURT | MILWAUKEE COUNTY

ERIN DYKEMA, DALE DYKEMA, and JANE DYKEMA,

Plaintiffs,

vs. Case No. 89-CV-015890

VOLKSWAGENWERK AG, VOLKSWAGEN OF AMERICA, INC., HEISER TOYOTA INC., AMERICAN HARDWARE MUTUAL INS. CO., STATE OF WISCONSIN, and THE TRAVELERS INSURANCE CO.,

Defendants.

JUDGMENT

The above-entitled action being brought on for jury trial on July 13, 1992, before the Honorable William D. Gardner, presiding circuit court judge, and the jury having rendered their special verdict, finding that the defendants, Volkswagenwerk AG and Volkswagen of America, Inc., were not negligent and that the subject Volkswagen vehicle was not defective and unreasonably dangerous; and that the plaintiff, Erin Dykema, was negligent and that such negligence constituted 100% of the causal negligence producing her injuries; and the court having considered the motions after verdict filed on behalf of the respective parties and entered an Order for Judgment dated March 1, 1993.

NOW, THEREFORE, it is adjudged:

1. That the complaint and various amended complaints of the plaintiffs, as well as any claims of the defendants, State of Wisconsin and the Travelers Insurance Company, against the defendants, Volkswagenwerk AG and Volkswagen of America, Inc. are dismissed on the merits.

2. That all other pleadings and causes of action set forth in the pleadings against the defendants, Volkswagenwerk AG and Volkswagen of America, Inc. are dismissed on its merits.

3. That the defendants, Volkswagenwerk AG and Volkswagen of America, Inc., be awarded costs as provided by law as against plaintiff, Erin Dykema, in the amount of $51,730.07.

IT IS FURTHER ADJUDGED:

In accordance with the provisions of sec. 806.01(1), Wis. Stats., that the residence, occupation or trade of the parties are as follows:

A. Plaintiff, Erin Dykema, resides at W255 N5725 Wrendale Drive, Sussex, Wisconsin; that Erin Dykema is currently unemployed.

B. Defendant, Volkswagenwerk AG, is a foreign corporation with its principal place of business located at 3180 Wolfsburg, Germany.

C. Defendant, Volkswagen of America, Inc., is a New Jersey corporation with its principal place of business located at 3800 Hamlin Road, Auburn Hills, Michigan.

Dated at Milwaukee, Wisconsin this 1 day of April, 1993.

GARY J. BARCZAK
Clerk of Courts

/s/ By Norma W. Forrai
JUDGMENT CLERK

Office of the Clerk

SUPREME COURT

231 E. STATE CAPITOL
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
TELEPHONE 608-266-1880

February 21, 1995

To:

Hon. William D. Gardner
Milwaukee County Circuit Court
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Milwaukee, WI 53233

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100 E. Wisconsin Ave. #2600
Milwaukee, WI 53202-4115

You are hereby notified that the Court has entered the following order:

Nos. 93-1341 *Dykema v. Volkswagenwerk AG, et al.*
and 93-2579 L.C. #89CV15890

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant-cross respondent-petitioner, Erin Dykema, and considered by the court,

IT IS ORDERED that the petition for review is denied, with $50 costs.

Abrahamson, J., dissents.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS
OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

DISTRICT 1

REMITTITUR

ERIN DYKEMA,
PLAINTIFF-APPELLANT-
CROSS RESPONDENT,
V.
VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation,
DEFENDANTS-RESPONDENTS-
CROSS APPELLANTS,
STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,
DEFENDANTS-RESPONDENTS.

APPEAL NO. 93-1341

T.Ct. NO. 89-CV-015890

THIS CAUSE WAS AN APPEAL/CROSS APPEAL TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF MILWAUKEE COUNTY. UPON CONSIDERATION, IT IS ORDERED AND ADJUDGED BY AN OPINION FILED ON NOVEMBER 08, 1994, THAT:

JUDGMENTS AFFIRMED.

MTS Wrote Decision/Opinion
PANEL: HON. MICHAEL T SULLIVAN
HON. TED E WEDEMEYER JR
HON. RALPH ADAM FINE

WITH COSTS TAXED AGAINST:

APPELLANT-CROSS RESPONDENT IN THE AMOUNT OF $5498.50.

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR MILWAUKEE COUNTY.

I CERTIFY THAT THE ABOVE IS A CORRECT TRANSCRIPT OF THE ORIGINAL ORDER AND JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

DATED:
FEBRUARY 23, 1995.

/S/MLG

MARILYN L. GRAVES
CLERK, COURT OF APPEALS

COURT OF APPEALS
OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

DISTRICT 1

REMITTITUR

ERIN DYKEMA, APPEAL NO. 93-2579
PLAINTIFF-APPELLANT,
V. T.Ct. NO. 89-CV-015890
VOLKSWAGENWERK AG, a foreign corporation and VOLKSWAGEN OF AMERICA, INC., a foreign corporation,
DEFENDANTS-RESPONDENTS,
STATE OF WISCONSIN, a sovereign body and THE TRAVELERS INSURANCE CO., a foreign corporation,
DEFENDANTS.

THIS CAUSE WAS AN APPEAL TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT OF MILWAUKEE COUNTY. UPON CONSIDERATION, IT IS ORDERED AND ADJUDGED BY AN OPINION FILED ON NOVEMBER 08, 1994, THAT:

JUDGMENTS AFFIRMED.

MTS Wrote Decision/Opinion
PANEL: HON. MICHAEL T SULLIVAN
HON. TED E WEDEMEYER JR
HON. RALPH ADAM FINE

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR MILWAUKEE COUNTY.

I CERTIFY THAT THE ABOVE IS A CORRECT TRANSCRIPT OF THE ORIGINAL ORDER AND JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

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FEBRUARY 23, 1995.

/S/MLG

MARILYN L. GRAVES
CLERK, COURT OF APPEALS

49 C.F.R. § 571.208 S4.1.2

S4.1.2 *Passenger cars manufactured from September 1, 1973, to August 31, 1983.* Each passenger car manufactured from September 1, 1973, to August 31, 1981 inclusive, shall meet the requirements of S4.1.2.1, S4.1.2.2, or S4.1.2.3. . . .

S4.1.2.1 *First option – complete passive protection system.* The vehicle shall:

(a) At each front designated seating position meet the frontal crash protection requirements of S5.1 by means that require no action by vehicle occupants;

(b) At each rear designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 and S7.2; and

(c) Either: (1) Meet the lateral crash protection requirements of S5.2 and the rollover crash protection requirements of S5.3 by means that require no action by vehicle occupants; or

(2) At each front designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 and to S7.1 through S7.3, and that meets the requirements of S5.1 with front test dummies as required by S5.1, restrained by the Type 1 or Type 2 seat belt assembly (or the pelvic portion of any Type 2 seat belt assembly which has a detachable upper torso belt) in addition to the means that require no action by the vehicle occupant.

S4.1.2.2 *Second option – head-on passive protection system.* The vehicle shall –

(a) At each designated seating position have a Type 1 seat belt assembly or a Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.

(b) At each front designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;

(c) At each front designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seatbelt assembly; and

(d) At each front outboard designated seating position, have a seatbelt warning system that conforms to S7.3.

S4.1.2.3 *Third option – lap and shoulder belt protection system with belt warning.*

S4.1.2.3.1 Except for convertibles and open-body vehicles, the vehicle shall –

(a) At each front outboard designated seating position have a seat belt assembly that conforms to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3. The belt assembly shall be either a Type 2 seat belt assembly with a nondetachable shoulder belt that conforms to Standard No. 209 (§ 571.209), or a Type 1 seat belt assembly such that with a test device restrained by the assembly the vehicle meets the frontal crash protection requirements of S5.1 in a perpendicular impact.

(b) At any center front designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and a seat belt warning system that conforms to S7.3; and

(c) At each other designated seating position, have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and S7.1 and S7.2 of this standard.

S4.1.2.3.2 Convertibles and open-body type vehicles shall at each designated seating position have a Type 1 or Type 2 seat belt assembly that conforms to Standard No. 209 (§ 571.209) and to S7.1 and S7.2 of this standard, and at each front designated seating position have a seat belt warning system that conforms to S7.3.

(2)

No. 94-1910

Supreme Court, U.S.
FILED
JUL 6 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

ERIN DYKEMA,

Petitioner,

v.

VOLKSWAGENWERK AG, AND VOLKSWAGEN OF AMERICA, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Wisconsin

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169), expressly preempts a state common law standard that conflicts with Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208.

RULE 29.1 STATEMENT

Respondent Volkswagen AG (sued as Volkswagenwerk AG (VWAG)), a corporation organized and existing under the laws of the Federal Republic of Germany, has issued shares that are traded on a public foreign exchange. Respondent Volkswagen of America, Inc., is a wholly owned subsidiary of VWAG and has issued no publicly traded shares. Other major subsidiaries and affiliates of VWAG in which it has a substantial interest include:

AUDI AG
AUTOGERMA S.p.A.
Autolatina Argentina S.A.
Autolatina Brasil S.A.
Autolatina Comercio, Negocios e Participacoes Ltda.
Coordination Center Volkswagen S.A.
Europcar International S.A.
Financiera Seat, S.A.
InterRent-Europcar Autovermietung GmbH
Seat Leasing GmbH
Seat Motors International B.V.
Seat Kredit Bank GmbH
Shanghai-Volkswagen Automotive Company
Sociedad Espanola de Automoviles de
TAS Tvornica Automobila Sarajevo GmbH
Turismo, S.A.
V.A.G. France S.A.
V.A.G. Financement S.A.
V.A.G. Sverige AB
V.A.G. Transport GmbH & Co. OHG
V.A.G. Bank GmbH
V.A.G. LEASING GmbH
Volkswagen of Nigeria Ltd.
Volkswagen Canada Inc.
Volkswagen Investments Ltd.
Volkswagen International Finance N.V.
Volkswagen Bruxelles S.A.

Volkswagen Audi Nippon K.K.
Volkswagen de Mexico, S.A. de C.V.
Volkswagen of South Africa (Pty.) Ltd.
VOTEX GmbH
VW Credit, Inc.
VW-GEDAS & Co. Projektmanagement OHG

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.1 STATEMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT	2
A. The Safety Act and FMVSS 208	2
B. Factual and Procedural Background	5
C. The Wisconsin Court of Appeals' Decision	7
REASONS FOR DENYING THE PETITION	8
A. Waiver	9
B. Implied Preemption	10
C. Express Preemption	14
D. Summary	23
CONCLUSION	24

TABLE OF AUTHORITIES

Cases: **Page(s)**

Allen v. *Pennco Engineering Co.*, 847 F. Supp. 1315 (M.D. La. 1994) 16

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Asahi Metal Indus. Co. v. *Superior Court*, 480 U.S. 102 (1987) 18

Bingham v. *Terminix Int'l Co.*, 850 F. Supp. 516 (S.D. Miss. 1994) 16

Bokis v. *American Medical Sys., Inc.*, 875 F. Supp. 748 (W.D. Ok. 1995) 17

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TABLE OF AUTHORITIES — Continued

Page(s)

Chisom v. *Roemer*, 501 U.S. 380 (1991) 21

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Farner v. *Brunswick Corp.*, 607 N.E.2d 562 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993) 18

Fidelity Fed. Sav. & Loan Ass'n v. *de la Cuesta*, 458 U.S. 141 (1982) 13

Freightliner Corp v. *Myrick*, 115 S. Ct. 1483 (1995) 10, 15

Gardner v. *Honda Motor Co.*, 536 N.Y.S.2d 303 (App. Div. 1988), app. dismissed, 543 N.Y.S.2d 401 (1989) 12

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TABLE OF AUTHORITIES — Continued

Page(s)

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Griffin v. *Medtronic, Inc.*, 840 F. Supp. 396 (D. Md. 1994) 17

Hopkins v. *Ciba-Geigy Corp.*, 432 S.E.2d 142 (N.C. Ct. App. 1993) 16

Hunsaker v. *Surgidev Corp.*, 818 F. Supp. 744 (M.D. Pa. 1992), aff'd, 5 F.3d 1489 (3d Cir. 1993) 18

In Interest of Jamie L., 493 N.W.2d 56 (Wis. 1992) 10

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Page(s)

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Kolich v. *Sysco Corp.*, 825 F. Supp. 959 (D. Kan. 1993) 17

Levesque v. *Miles Inc.*, 816 F. Supp. 61 (D.N.H. 1993) 17

MacDonald v. *Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994) 16

Mayor v. *Educational Equality League*, 415 U.S. 605 (1974) 12

Mendes v. *Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994) 17

Michael v. *Shiley, Inc.*, 46 F.3d 1316 (3d Cir. 1995) 17

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TABLE OF AUTHORITIES — Continued

Page(s)

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O'Bryan v. *Volkswagen of America, Inc.*, 838 F. Supp. 319 (W.D. Ky. 1992) 13

Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207 (1986) 23

Papas v. *Upjohn Co.*, 985 F.2d 516 (11th Cir.), cert. denied, 114 S. Ct. 300 (1993) 16, 18

Pennsylvania R.R. v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915) 22

Perry v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257 (5th Cir. 1992) 23

Pokorny v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990) 12

Quad R Farms v. *American Cyanamid Co.*, 840 F. Supp. 694 (D. Minn. 1993) 16

Reiter v. *Zimmer, Inc.*, 830 F. Supp. 199 (S.D.N.Y. 1993) 18

Richman v. *W.L. Gore & Assoc., Inc.*, 881 F. Supp. 895 (S.D.N.Y. 1995) 17

TABLE OF AUTHORITIES — Continued

Page(s)

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Shenker v. *Baltimore & Ohio R.R.*, 374 U.S. 1 (1963) 18

Shield v. *Bayliner Marine Corp.*, 822 F. Supp. 81 (D. Conn. 1993) 18

Shields v. *Outboard Marine Corp.*, 776 F. Supp. 1579 (M.D. Ga. 1991) 18

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Sommerville v. *United States*, 376 U.S. 909 (1964) 10

Stamps v. *Collagen Corp.*, 984 F.2d 1416 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993) 16

State ex rel. Jones Chems., Inc. v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994) 17

State v. *Johnson*, 449 N.W.2d 854 (Wis. 1990) 10

Taylor v. *Freeland & Kronz*, 503 U.S. 638 (1992) 12

TABLE OF AUTHORITIES — Continued

Page(s)

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Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 22

Trinity Mountain Seed Co. v. *MSD Agvet, Div. of Merck & Co.*, 844 F. Supp. 597 (D. Idaho 1994) 16

Tucker v. *Collagen Corp.*, No. 93 C 2375, 1994 WL 87367 (N.D. Ill. Mar. 16, 1994) 17

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Yowell v. *Chevron Chem. Co.*, 836 S.W.2d 62 (Mo. Ct. App. 1992) 17

Statutes and regulations:

7 U.S.C. §§ 136, et seq. 16

TABLE OF AUTHORITIES — Continued

	Page(s)
15 U.S.C. §§ 1261, et seq.	17
15 U.S.C. §§ 1381-1431	1
15 U.S.C. § 1391(1)	2
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15 U.S.C. § 1392(d)	*passim*
15 U.S.C. § 1392(f)(3)	2
15 U.S.C. § 1397(k)	*passim*
21 U.S.C. §§ 360c, et seq.	17
46 U.S.C. §§ 4301, et seq.	17
49 U.S.C. § 30103	19
49 U.S.C. § 30103(b)	19
49 U.S.C. § 30103(e)	19
49 U.S.C. §§ 30101-30169	1
Pub. L. 103-272, § 1(e), 108 Stat. 943	19
Wis. Stat. § 809.62(b)	9
49 C.F.R. § 571.208	1
49 C.F.R. § 571.208, S1	3
49 C.F.R. § 571.208, S4.1.2.1	4
49 C.F.R. § 571.208, S4.1.2.2	4
49 C.F.R. § 571.208, S4.1.2.2(b)	4
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TABLE OF AUTHORITIES — Continued

Page(s)

49 C.F.R. § 571.208, S4.5.3. 5

Miscellaneous:

39 Fed. Reg. 3834 (1974) 14

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42 Fed. Reg. 5071 (1977) 14

42 Fed. Reg. 34289 (1977) 14

49 Fed. Reg. 28962 (1984) 14

112 Cong. Rec. 14253 (1966) 3

H.R. Conf. Rep. No. 1776, 89th Cong., 2d Sess (1966) 3, 21

H.R. Rep. No. 1919, 89th Cong., 2d Sess. (1966) 21

S. Rep. No. 1301, 89th Cong., 2d Sess. (1966) 3

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1910

ERIN DYKEMA,

Petitioner,

v.

VOLKSWAGENWERK AG, AND VOLKSWAGEN OF AMERICA, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Wisconsin

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of a single question (Pet. i): whether the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169) (Safety Act),[1] expressly preempts state common law tort claims that conflict with Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208. This is purely an academic question, however, because its resolution will not have any effect on the outcome of this case. The Wisconsin Court of Appeals held that petitioner's tort claims were both expressly *and impliedly* preempted by the Safety Act, and petitioner has now waived the implied preemption issue by

[1] For ease of reference we refer to the prior codification of the Safety Act, which is cited in the petition and in the opinion of the court below.

not presenting it in her certiorari petition. Furthermore, preemption aside, the jury found that the restraint system in petitioner's car was *not* defectively designed and returned a verdict for the Volkswagen defendants (hereinafter Volkswagen or VW).

In any event, the court below correctly resolved the express preemption issue, and petitioner is plainly wrong in asserting that this ruling "is in conflict with the decisions of all of the federal courts of appeal which have considered the issue." Pet. 13. In fact, the cases petitioner relies on were decided prior to this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), and the post-*Cipollone* decisions strongly support the decision below. In sum, there is no reason to grant the petition in this case.

STATEMENT

A. The Safety Act and FMVSS 208

Congress enacted the Safety Act in 1966 to protect the public "against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and against unreasonable risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1). It sought to accomplish this goal by authorizing the Secretary of Transportation to prescribe safety standards of nationwide applicability. Congress declared that such standards must "meet the need for motor vehicle safety" and be "reasonable" and "practicable" in their operation. 15 U.S.C. §§ 1392(a), 1392(f)(3).

Congress intended the safety standards promulgated under the Act to be "uniform national standards," *Wood* v. *General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990), and achieved that objective by preempting state law in the following express terms (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Another provision of the Act added a so-called "savings" clause, which provides that compliance with federal standards does not necessarily "exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

Explaining the need to preempt state law, the Senate Report on the Act emphasized that "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. Rep. No. 1301, 89th Cong., 2d Sess. 4, 12 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2720. The House Report noted that "this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards." H.R. Conf. Rep. No. 1776, 89th Cong., 2d Sess 17 (1966). As President Johnson observed: "The only alternative is unthinkable — 50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14253 (1966).

In exercising the Department of Transportation's authority under the Safety Act, the National Highway Traffic Safety Administration (NHTSA) has promulgated numerous standards dealing with vehicle design and performance. At issue in this case is FMVSS 208, which addresses the "requirements for the protection of vehicle occupants in crashes." 49 C.F.R. § 571.208, S1. In particular, for passenger cars manufactured between September 1, 1973 and

September 1, 1986, FMVSS 208 provided three designated design "options" for safety restraint systems and performance requirements for each:

1. Complete passive protection for all crashes (S4.1.2.1);

2. Passive restraints for head-on crashes (S4.1.2.2); or

3. Lap and shoulder belt protection systems with belt warnings (manual three-point seat belts) (S4.1.2.3).

Federal regulations thus gave a manufacturer the right to choose any one of these three design options for its vehicles.

The second option available under FMVSS 208 protected vehicle occupants "by means that require no action by [the] occupants * * *." 49 C.F.R. § 571.208, S4.1.2.2(b).[2]

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[2] The second design option in FMVSS 208 for passenger cars manufactured between September 1, 1973 and September 1, 1986 read in full:

> S4.1.2.2 *Second option—head-on automatic protection system.* The vehicle shall—
>
> (a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard.
>
> (b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;
>
> (c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and
>
> (d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

Indeed, the regulations expressly provided that "a seat belt assembly that requires no action by vehicle occupants * * * may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option." *Id.* at § 571.208, S4.5.3. In sum, a manufacturer could opt to comply with FMVSS 208 by installing passive seat belts that met the performance requirements of any of the three restraint system design options with no manually-activated seat belts at all.

B. Factual and Procedural Background

Petitioner Erin Dykema was seriously injured in April 1988 when the 1978 Volkswagen Rabbit she was driving left the road and rolled over. Petitioner was thrown from the car and rendered a quadriplegic. No other vehicles were involved in the accident. Pet. App. 3. The Volkswagen Rabbit "was equipped with a passive-restraint system that featured a two-point body restraint, a knee bar, and a ramped seat. The system, known as the VWRA, was automatically engaged when drivers positioned themselves in the seat." *Ibid.*

Petitioner filed suit in the Circuit Court for Milwaukee County, Wisconsin, asserting common law negligence and strict product liability claims against Volkswagen. Pet. App. 2. Petitioner urged that the 1978 Volkswagen Rabbit was defectively designed and that Volkswagen was negligent with respect to the design of the vehicle's safety restraint system because it should have had a manually-activated lap belt. Pet. 9.

Following the presentation of petitioner's case-in-chief, Volkswagen moved to dismiss petitioner's claims. Volkswagen contended that the passive restraint system in the Rabbit fully met the requirements for the second safety design option in FMVSS 208, that petitioner's claims sought to

---

See also 49 C.F.R. § 571.208, S4.5.3.

impose a state common law standard inconsistent with the federal safety standard, and that those claims accordingly were expressly and impliedly preempted by the Safety Act. Although the Circuit Court agreed with Volkswagen — and petitioner did not dispute — that the VWRA system complied with FMVSS 208 (Pet. App. 20), it nonetheless denied VW's motion.

The trial court found no express preemption because the preemption section of the Act, 15 U.S.C. § 1392(d), refers to "conflicting [state law] standards" and, in the court's view, "[s]tandards are not imposed by verdicts in tort actions." Pet. App. 21; see *ibid.* (the language in Section 1392(d) "does not relate to common law actions but to state statutes and regulations"). The trial court believed that its interpretation was "consistent with and justifies the existence of the savings clause section 1397(c) [*sic*]." Pet. App. 21. As for implied preemption, the court found no conflict between petitioner's claims and FMVSS 208. "The addition of a lap belt or other type of torso restraint wouldn't conflict with the Federal Standards, but would supplement them." Pet. App. 23.

After the denial of Volkswagen's motion, the trial continued. Following eight weeks of testimony, including the testimony of numerous expert witnesses presented by both petitioner and respondents, the jury returned a verdict for Volkswagen. Pet. App. 23. In its special verdict, the jury found that Volkswagen was "not negligent and that the subject Volkswagen vehicle was not defective and unreasonably dangerous; and that [petitioner], Erin Dykema, was negligent and that such negligence constituted 100% of the causal negligence producing her injuries." *Id.* at 25.

On motions after the verdict, petitioner alleged that the jurors engaged in misconduct. The trial court held an evidentiary hearing and, thereafter, denied her motion for a

new trial. The court entered an order dismissing petitioner's complaint "on the merits." *Id.* at 26.

Petitioner then appealed and, as a consequence, Volkswagen cross-appealed. Petitioner presented only one issue for review on appeal, arguing that she was entitled to a new trial because of alleged jury misconduct. Pet. App. 2. In its cross-appeal, VW argued that the trial court erred in failing to dismiss petitioner's claims as preempted by the Safety Act. *Ibid.*

C. The Wisconsin Court of Appeals' Decision

The Wisconsin Court of Appeals reversed the denial of VW's motion to dismiss and affirmed the judgment in VW's favor. The Court of Appeals agreed with Volkswagen that petitioner's tort claims were preempted by the Safety Act and FMVSS 208. Pet. App. 2-4. Because of its preemption holding, the Court of Appeals did not address petitioner's alleged jury misconduct issue. *Ibid.*

The Court of Appeals' preemption analysis relied heavily on its prior decision in *Boyle* v. *Chrysler Corp.*, 501 N.W.2d 865, 867, rev. denied, 510 N.W.2d 137 (Wis. 1993), which held that the Safety Act "preempts state law claims based on the absence of airbags or other types of restraints." The *Boyle* court found that the Safety Act both expressly ("explicit preemption," *id.* at 869-870) and impliedly ("implicit preemption," *id.* at 870-871) preempted such common law claims.

After noting petitioner's concession that the 1978 Volkswagen Rabbit complied fully with FMVSS 208,[3] the

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[3] "Throughout the pretrial motions, the trial, and on appeal, Dykema has never argued that the VWRA system did not comply with the requirements of FMVSS 208. Indeed, at oral argument, Dykema stated that she did not dispute the fact that the VWRA complied with the standard." Pet. App. 6.

Court of Appeals concluded that its "holding in *Boyle* controls the disposition of this case." Pet. App. 7. Petitioner's "claims, which were based upon VW's alleged failure to provide reasonable adequate lower pelvic restraint, would establish a different safety standard from that required by federal law. *Boyle* specifically states that such claims are preempted." Pet. at 8. "Accordingly, we conclude that the holding and analysis in *Boyle* controls and, therefore, the trial court erred when it failed to dismiss Dykema's action." Pet. App. 8.

Following the decision of the Court of Appeals, petitioner sought discretionary review of the express *and* implied preemption issues in the Supreme Court of Wisconsin, which was denied. *Id.* at 29-39. Petitioner did not seek review of the jury misconduct issue.

REASONS FOR DENYING THE PETITION

Petitioner seeks review by this Court of a narrow issue of *express* preemption under the Safety Act. Specifically, petitioner contends that the Safety Act does not expressly preempt her common law tort claims against Volkswagen, even though those common law claims address an aspect of restraint system design in a manner flatly inconsistent with FMVSS 208.

There is no reason for the Court to concern itself with the express preemption issue in this case because the Wisconsin Court of Appeals held that petitioners claims were both expressly *and impliedly* preempted by the Safety Act. Remarkably, the petition does not even raise the implied preemption issue. This case does not merit further review because *every* federal court of appeals to address the issue has found that FMVSS 208 impliedly preempts inconsistent common law claims. Moreover, even if this Court were to disagree with the court below on both express and implied preemption, petitioner still would not prevail in this case because the jury rejected her tort claims on the merits,

finding that her car was not defectively designed and that she, in fact, was causally responsible for her injuries.

Petitioner has thus contrived a narrow question of express preemption that is wholly academic to the ultimate disposition of this case. Even on this limited question, review is not warranted because the decision below is plainly correct, and petitioner's claim of a conflict among the lower courts relies almost entirely on decisions that predate this Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

A. Waiver

To begin with, this case is not an appropriate vehicle for the Court to address the question whether the Safety Act expressly preempts inconsistent state common law standards. It is procedurally flawed because petitioner will not prevail on her tort claims even if this Court grants review and reverses the Court of Appeals' decision in favor of Volkswagen.

After a lengthy trial with expert testimony proffered by both petitioner and respondent, petitioner lost on the merits of her claims that the safety restraint system in respondent's automobile was defectively designed and that Volkswagen was negligent. "At the conclusion of the eight-week trial, the jury found that the 1978 Volkswagen Rabbit was not defectively designed and that VW was not negligent." Pet. App. 4. The jury also found that petitioner's own negligence had caused her injuries. Pet. 25.

Petitioner's sole argument in the Court of appeals was based on allegations of jury misconduct. Pet. App. 2-3. Petitioner did not raise this issue in her petition for review filed with the Wisconsin Supreme Court. The Wisconsin Rules of Appellate Procedure required petitioner to set forth every issue for which review was sought or risk waiver. Wis. Stat. § 809.62(b) ("If the petition is granted, the petitioner cannot raise or argue issues not set forth in the petition unless ordered otherwise by the Supreme Court"); see

In Interest of Jamie L., 493 N.W.2d 56 (Wis. 1992); *State* v. *Johnson*, 449 N.W.2d 854 (Wis. 1990). It is therefore at least an open question, not yet decided by the Wisconsin Supreme Court, whether petitioner has waived her right to continue to litigate the jury misconduct claim.

Thus, even if petitioner prevails in this Court on the preemption issue, she cannot prevail on the merits of her tort claims without winning both the jury misconduct issue in the Court of Appeals, which she may well have abandoned, *and* a favorable verdict at a subsequent new trial. This Court is loathe to expend valuable judicial resources to resolve an issue that is not likely to affect the ultimate outcome of a case. See *Sommerville* v. *United States*, 376 U.S. 909 (1964).

B. Implied Preemption

The petition is fatally flawed for another reason, because it is premised on a fundamental misreading of the Court of Appeals' holding as limited strictly to express preemption. See Pet. 27. Petitioner suggests that, as a result of this limited holding, the case presents only the express preemption issues left unresolved in *Freightliner Corp* v. *Myrick*, 115 S. Ct. 1483 (1995). See Pet. 13.

Unfortunately for petitioner, the Court of Appeals' decision was clearly not limited to express preemption. The court below also decided the implied preemption issue, which is independently dispositive of petitioner's claims.

It is beyond dispute that the trial court ruled on both the express and implied preemption arguments raised by Volkswagen. Pet. App. 20-23. It is equally undisputed that Volkswagen and petitioner extensively briefed and argued the issues of express *and* implied preemption to the Court of Appeals and discussed them in light of that court's prior decision in *Boyle*. See Brief of Defendants-Cross Appellants 26-50; Brief of Plaintiff-Cross Respondent 19-49; Defendants-

Respondents-Cross-Appellants' Reply Brief 7-14; Supplemental Memorandum of Law on Defendants' Cross Appeal Filed Pursuant to the Court's Order Dated August 3, 1994; Plaintiff's Supplemental Memorandum on Defendants' Cross Appeal. Indeed, the two primary headings of Volkswagen's reply brief in the Court of Appeals read (at 7, 10): "Following *Boyle*, Cross-Respondent's Claims Are Expressly Preempted" and "Following *Boyle*, Cross-Respondent's Claims Are Impliedly Preempted."

The Court of Appeals concluded that the express and implied preemption claims were resolved by its decision in *Boyle*: "our holding in *Boyle* controls the disposition of this case." Pet. App. 7; see *id.* at 8 ("we conclude that the holding and analysis in *Boyle* controls and, therefore, the trial court erred when it failed to dismiss Dykema's action"). And *Boyle* was plainly decided on both express and implied preemption grounds (501 N.W.2d at 871):

> In summary, the Federal Motor Vehicle Safety Act explicitly preempts Boyle's lack of passive restraints claims because that claim conflicts with the federal Act's statutory scheme. As an alternative ground for our holding, even if it were determined that the federal Act does not explicitly preempt the portion of Boyles' claim based on the absence of passive restraints, that portion of her claim is implicitly preempted because it conflicts with Congress' intent manifested in the explicit preemption provision.

Indeed, petitioner admits that *Boyle* was decided on both express and implied preemption grounds. Pet. 12.

In sum, the decision below — which adopts unequivocally the "holding and analysis" of *Boyle* (Pet. App. 8) — is based on express *and implied* preemption. There is no hint in the Court of Appeals' opinion that its holding in this case, unlike the holding in *Boyle*, was somehow limited to express preemption.

Contrary to petitioner's suggestion, therefore, she can prevail in this Court only if the Court decides the issue of implied preemption under the Safety Act. And that question does not merit review for a number of reasons. Most important, the Question Presented in the petition raises only the issue of express preemption (Pet. i), and the body of the petition nowhere argues the implied preemption point. Under longstanding practice, the implied preemption issue has been waived because this Court will consider "[o]nly the questions set forth in petition" (S. Ct. R. 14.1). See *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-646 (1992); *Yee* v. *Escondido*, 503 U.S. 519, 535 (1992); *Mayor* v. *Educational Equality League*, 415 U.S. 605, 623 (1974); *Irvine* v. *California*, 347 U.S. 128, 129-130 (1954).

In any event, even if it were properly presented, the implied preemption issue would not warrant further consideration because there is no conflict in the lower courts. Every federal court of appeals to address the issue has concluded that tort claims such as petitioner's, premised on a motor vehicle manufacturer's exercise of a FMVSS 208 safety design option, are impliedly preempted under the Safety Act.[4] Indeed, petitioner conveniently obscures the

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[4] See *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1990); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990). Several state appellate courts have reached the same result. See, *e.g.*, *Nissan Motor Corp.* v. *Superior Court*, 261 Cal. Rptr. 80 (Cal. Ct. App. 1989), cert. denied, 494 U.S. 1066 (1990); *Gardner* v. *Honda Motor Co.*, 536 N.Y.S.2d 303 (App. Div. 1988), app. dismissed, 543 N.Y.S.2d 401 (1989); *Wickstrom* v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. Ct. App. 1987), cert. denied, 487 U.S. 1236 (1988).

fact that the court of appeals decisions she cites (Pet. 18-19) to establish a conflict on express preemption uniformly conclude that common law claims such as hers are impliedly preempted.

Under these precedents, the Wisconsin Court of Appeals' implied preemption ruling was plainly correct. At the time respondent's automobile was manufactured, FMVSS 208 gave Volkswagen the *design option* to install fully passive, automatic two-point safety belts with no manually-activated lap belts. As the Solicitor General explained in his *amicus curiae* brief in *Wood* v. *General Motors Corp.*, cert. denied, 494 U.S. 1065 (1990), the Secretary of Transportation sought to "promote motor vehicle safety" through FMVSS 208 by "affirmatively * * * encourag[ing] manufacturers to use a *variety* of protection systems in their fleets." U.S. Br. 12, 15 (emphasis in original). Such diversity was intended to "ensur[e] public acceptance of passive protection systems," "encourag[e] the development of new and improved technologies," and "enabl[e] [NHTSA] to acquire a more extensive data base upon which future regulatory decisions could be made." *Id.* at 12-13. In sum, FMVSS 208 was consciously designed to give manufacturers a choice among various passive restraint systems, rather than to mandate one particular system. See pages 2-5, *supra*. Any state law that removes or restricts a design option granted by federal law conflicts with federal law and is preempted. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982).

Here, as both the trial judge and the Wisconsin Court of Appeals found, Volkswagen complied fully with FMVSS 208 by invoking option two, which authorized passive safety restraints without a manual lap belt. See Pet. App. 6, 20; see also *O'Bryan* v. *Volkswagen of America, Inc.*, 838 F. Supp. 319, 324 (W.D. Ky. 1992) (Volkswagen's two-point passive restraint system met requirements of second option of FMVSS 208). In fact, in 1974 NHTSA expressly determined that

Volkswagen's passive restraint system met the requirements of option two of FMVSS 208 without manual seat belts, concluding that "[o]ption two exists * * * to accommodate the introduction of passive restraint systems like Volkswagen's." 39 Fed. Reg. 3834, 3834 (1974). Since then, a long line of Secretaries of Transportation has approved (and lauded) the use of the automatic seat belt in Volkswagen's passive restraint system. See, *e.g.*, 41 Fed. Reg. 24070, 24070 n.2, 24072 (1976) (Secretary Coleman); 42 Fed. Reg. 34289, 34295 (1977) (Secretary Adams); 49 Fed. Reg. 28962, 28999 (1984) (Secretary Dole).[5] Certainly it would frustrate the purposes of FMVSS 208 if state common law could make the use of this restraint system tortious.

Thus, for petitioner to prevail, this Court would be required to address not only the express preemption issue, but also the implied preemption defense interposed by Volkswagen — an issue that is *not* included in the question presented, *not* discussed on the merits in the petition, and *not*, in any event, the subject of any conflict in the appellate courts.

C. Express Preemption

Procedural problems aside, petitioner's express preemption argument does not merit review. Contrary to petitioner's assertion (Pet. 15), there is not in fact any actual conflict between the Court of Appeals' decision on express preemption and "the decisions of every federal court of appeals which has considered the issue."[6] Virtually all of the

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[5] In early 1977, the Department of Transportation contracted with Volkswagen to manufacture 125,000 cars equipped with the system in a "demonstration program to exhibit the effectiveness of passive restraint systems." 42 Fed. Reg. 5071, 5071 (1977).

[6] Petitioner also claims that there is a conflict between the decision below and the Court of Appeals' decision in another Safety

appellate cases cited by petitioner were decided before this Court's decision in *Cipollone*, which eliminated any doubt about whether the safety "standards" referred to in the preemption provision of the Safety Act, 15 U.S.C. § 1392(d), include common law standards.[7] Petitioner's argument to the contrary (Pet. 21-22) cannot stand in light of this decision.

The Court in *Cipollone* held that the express preemption provision at issue in that case included common law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" See 112 S. Ct. at 2619-2621 (plurality) (citation omitted); *id.* at 2634 (Scalia, J.). The *Cipollone* Court held that it made no difference that the preemption clause failed to refer to common law claims. See also *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1737-1738 (1993). The Court's holding was premised on its long-held view that "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" *Cipollone*, 112 S. Ct. at 2620 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247

Act preemption case, *Derby* v. *Brenner Tank, Inc.*, 522 N.W.2d 274, rev. denied, 527 N.W.2d 335 (Wis. 1994). Even if there were a conflict between these decisions (and there is not in light of the fact that *Derby* involves FMVSS 108), that would be a matter of concern only to the Wisconsin Supreme Court, which has denied review in both cases. It is not an issue of national importance meriting review by this Court.

[7] Many of the federal district court and state court decisions cited by petitioner were likewise decided before *Cipollone*. And many of the post-*Cipollone* decisions finding no preemption were influenced by the Eleventh Circuit's erroneous decision on implied preemption under the Safety Act, which was reversed by this Court in *Myrick*. Finally, as petitioner concedes (Pet. 21), a number of federal district courts and state courts have found express preemption under the Safety Act.

(1959)). See also *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (a "system under which each State could, through its courts, impose * * * its own * * * requirements could hardly be more at odds with the uniformity contemplated by Congress").

Since the decision in *Cipollone*, the widely accepted understanding among the federal courts of appeals is that statutory language generically preempting state "law," "requirements" or "standards" necessarily includes claims based on state common law.[8] Indeed, the overwhelming majority of courts across the country have followed *Cipollone* and reached the same conclusion in interpreting the scope of express preemption clauses in numerous federal health and safety statutes, including the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136, *et seq.*,[9] the

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[8] See *Taylor AG Indus.* v. *Pure-Gro*, 1995 U.S. App. LEXIS 9150 *14 (9th Cir. Apr. 24, 1995); *National Bank of Commerce of El Dorado* v. *Kimberly-Clark Corp.*, 38 F.3d 988, 991 (8th Cir. 1994); *Gile* v. *Optical Radiation Corp.*, 22 F.3d 540, 542 (3d Cir.), cert. denied, 115 S. Ct. 429 (1994); *Worm* v. *American Cyanamid Co.*, 5 F.3d 744, 748-749 (4th Cir. 1993); *King* v. *E.I. Du Pont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir.), cert. dismissed, 114 S. Ct. 490 (1993); *Shaw* v. *Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), cert. denied, 114 S. Ct. 300 (1993); *Arkansas-Platte & Gulf Partnership* v. *Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir.), cert. denied, 114 S. Ct. 60 (1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir.), cert. denied, 114 S. Ct. 86 (1993).

[9] See, *e.g.*, *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994); *Bingham* v. *Terminix Int'l Co.*, 850 F. Supp. 516, 520 (S.D. Miss. 1994); *Allen* v. *Pennco Engineering Co.*, 847 F. Supp. 1315, 1319 (M.D. La. 1994); *Trinity Mountain Seed Co.* v. *MSD Agvet, Div. of Merck & Co.*, 844 F. Supp. 597, 601 (D. Idaho 1994); *Quad R Farms* v. *American Cyanamid Co.*, 840 F.

Federal Hazardous Substances Act, 15 U.S.C. §§ 1261, *et seq.*,[10] the Medical Device Amendments of 1976 to the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 360c, *et seq.*,[11] and the Federal Boat Safety Act, 46 U.S.C.

Supp. 694 (D. Minn. 1993); *DerGazarian* v. *Dow Chem. Co.*, 836 F. Supp. 1429, 1447 (W.D. Ark. 1993); *Kolich* v. *Sysco Corp.*, 825 F. Supp. 959, 961 (D. Kan. 1993); *Levesque* v. *Miles Inc.*, 816 F. Supp. 61, 69 (D.N.H. 1993); *Casper* v. *E.I. Du Pont de Nemours & Co.*, 806 F. Supp. 903, 907 (E.D. Wash. 1992); *Burke* v. *Dow Chem. Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992); *Gibson* v. *Dow Chem. Co.*, No. Civ. A. 92-30, 1992 WL 404681, *2 (E.D. Ky. Oct. 19, 1992); *Brennan* v. *Dow Chem. Co.*, 613 So. 2d 131, 132 (Fla. Dist. Ct. App. 1993); *Yowell* v. *Chevron Chem. Co.*, 836 S.W.2d 62, 66 (Mo. Ct. App. 1992); *June* v. *Laris*, 602 N.Y.S.2d 778, 784 (N.Y. Sup. Ct. 1993), aff'd, No. 70011, 1994 WL 601588 (N.Y. App. Div. Nov. 3, 1994); *Hopkins* v. *Ciba-Geigy Corp.*, 432 S.E.2d 142, 145-146 (N.C. Ct. App. 1993).

[10] See, *e.g.*, *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), cert. denied, 113 S. Ct. 2999 (1993); *DeHaan* v. *Whink Prods. Co.*, No. 91 C 0014, 1994 WL 24322, *6 (N.D. Ill. Jan. 26, 1994); *Salazar* v. *Whink Prods. Co.*, No. 93CA0055, 1994 WL 115876, *2 (Colo. Ct. App.), cert. denied, 115 S. Ct. 1315 (1994); *State ex rel. Jones Chems., Inc.* v. *Seier*, 871 S.W.2d 611 (Mo. Ct. App. 1994).

[11] See, *e.g.*, *Michael* v. *Shiley, Inc.*, 46 F.3d 1316, 1320 (3d Cir. 1995); *Mendes* v. *Medtronic, Inc.*, 18 F.3d 13 (1st Cir. 1994); *King* v. *Collagen Corp.*, 983 F.2d 1130, 1135 (1st Cir.), cert. denied, 114 S. Ct. 84 (1993); *Slater* v. *Optical Radiation Corp.*, 961 F.2d 1330, 1333 (7th Cir.), cert. denied, 113 S. Ct. 327 (1992); *Richman* v. *W.L. Gore & Assoc., Inc.*, 881 F. Supp. 895 (S.D.N.Y. 1995); *Bokis* v. *American Medical Sys., Inc.*, 875 F. Supp. 748, 751 (W.D. Ok. 1995); *Mitchell* v. *Collagen Corp.*, 870 F. Supp. 885, 887 (N.D. Ind. 1994); *Griffin* v. *Medtronic, Inc.*, 840 F. Supp. 396, 397 (D. Md. 1994); *Tucker* v. *Collagen Corp.*, No. 93 C 2375, 1994 WL 87367, *3 (N.D. Ill. Mar. 16, 1994);

§§ 4301, *et seq.*[12] There is every reason to believe that the courts that rejected express preemption claims prior to *Cipollone* would reconsider those rulings in light of this overwhelming authority. In *Papas*, *supra*, for example, the Eleventh Circuit reconsidered its holding on the preemptive scope of FIFRA in light of *Cipollone* and found express preemption of common law claims. The court concluded that the express preemption of state law "requirements," included "state regulation[s]" and common law damages actions. 985 F.2d at 518; see also *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-115 (1987) (referring to state common law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

In urging this Court to review the express preemption issue in this case, petitioner also relies (Pet. 13-19) on cases interpreting the Safety Act's so-called "savings" clause, 15 U.S.C. 1397(k) (compliance with a FMVSS "does not exempt any person from any liability under common law").

Kemp v. *Pfizer, Inc.*, 835 F. Supp. 1015, 1020 n.4 (E.D. Mich. 1993); *Reiter* v. *Zimmer, Inc.*, 830 F. Supp. 199, 203 (S.D.N.Y. 1993); *Cameron* v. *Howmedica, Div. of Pfizer Hosp. Prods. Group, Inc.*, 820 F. Supp. 317, 319 (E.D. Mich. 1993); *Hunsaker* v. *Surgidev Corp.*, 818 F. Supp. 744, 751 (M.D. Pa. 1992), aff'd, 5 F.3d 1489 (3d Cir. 1993); *Covey* v. *Surgidev Corp.*, 815 F. Supp. 1089, 1094 (N.D. Ohio 1993).

[12] See, *e.g.*, *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir. 1995); *Shield* v. *Bayliner Marine Corp.*, 822 F. Supp. 81, 84 (D. Conn. 1993); *Shields* v. *Outboard Marine Corp.*, 776 F. Supp. 1579, 1581 (M.D. Ga. 1991); *Mowery* v. *Mercury Marine*, 773 F. Supp. 1012, 1017 (N.D. Ohio 1991); *Farner* v. *Brunswick Corp.*, 607 N.E.2d 562, 567 (Ill. App. Ct. 1992), app. denied, 616 N.E.2d 333 (Ill. 1993).

Petitioner maintains that this clause shelters all common law claims from preemption.[13]

The text, structure, and legislative history of Section 1397(k) demonstrate, however, that it was not intended by Congress to restrict the scope of express preemption. Instead, the narrow language of Section 1397(k), which states that "compliance with any Federal motor vehicle safety standard * * * does not exempt any person from any liability under common law," by its terms negates only an affirmative common law defense of compliance with a government standard. Significantly, the clause does not refer to preemption or to the limits of federal supremacy; indeed, as the Safety Act was originally drafted, it was not even included in the part of the Act, Section 1392(d), that addresses federal preemption.[14]

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[13] The statute in *Cipollone*, unlike the Safety Act, lacked a savings clause. The mere presence of a so-called savings clause in the Safety Act cannot be dispositive on the issue of federal preemption, however, because this Court found express preemption of common law claims in *CSX Transp., Inc.* v. *Easterwood*, 113 S. Ct. 1732, 1736-1737 (1993), and the statute at issue in that case had a savings clause. See also *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-2040 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

[14] When Congress recodified the Safety Act in 1994, both Section 1392(d) and Section 1397(k) were appropriately placed in a new section, 49 U.S.C. § 30103, entitled "Relationship to other laws." Significantly, however, Section 1392(d) was placed in 49 U.S.C. § 30103(b), labeled "Preemption," whereas Section 1397(k) was placed in an entirely different subsection, 49 U.S.C. § 30103(e), whose title ("Common law liability") makes no reference to the Supremacy Clause or federal preemption. See Pub. L. 103-272, § 1(e), 108 Stat. 943.

Moreover, the text of Section 1397(k) differs significantly from the language employed by Congress both in the Safety Act and in many other statutes when it intended to restrict the scope of federal preemption. In the preemption section of the Safety Act (Section 1392(d)), for example, Congress included two true savings clauses restricting the scope of preemption:

> *Nothing in this section shall be construed* as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. *Nothing in this section shall be construed* to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1392(d) (emphases added). This is the all-encompassing phraseology that Congress had traditionally used in a savings clause, rather than the narrow "compliance with" language of Section 1397(k). See, *e.g.*, *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 114 S. Ct. 517, 525 (1993); *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2034 (1992).

Perhaps more important, the structure of the Safety Act shows that Section 1397(k) was not intended by Congress to be a sweeping exception to Section 1392(d). Section 1397(k) appears in a wholly separate section of the Act from Section 1392(d), which refers expressly to preemption and which contains two explicit savings clauses. Certainly, if Congress had intended Section 1397(k) to be an expansive third exception to the preemption provision in Section 1392(d), it would have included the language of Section 1397(k) alongside the other two express savings clauses in Section 1392(d).

This Court has noted the interpretive significance of the location of a savings clause in relation to the preemptive language of a statute. In *Easterwood*, the Court observed that the preemption section of the statute at issue contained "express saving and pre-emption clauses." 113 S. Ct. at 1736. The Court emphasized that the preemption section was "a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Id.* at 1738. In this case, by contrast, the Safety Act has no such solicitude for state law. Section 1392(d) is neither prefaced nor succeeded by an express savings clause for common law actions.

Finally, the legislative history of the Safety Act is further evidence that Section 1397(k) was not intended to carve a gaping hole in the preemption provision. Both the House and Conference Reports contain sections entitled "Preemption," but neither section discusses Section 1397(k). See H.R. Rep. No. 1919, 89th Cong., 2d Sess. 16 (1966); H.R. Conf. Rep. No. 1776, *supra*, at 17. The House Report mentions Section 1397(k) under the heading "Prohibited Acts and Exemption," and the Conference Report does not deal with it at all. Again, if Congress had intended Section 1397(k) to be a sweeping exception to the preemption provision, it surely would have described it as such in these reports. See *Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991). Rather, as its language indicates, Section 1397(k) was added merely to clarify that the Safety Act did not create an affirmative defense of compliance with government standards — or, as we next show, that the Safety Act was not intended to occupy the entire field of motor vehicle safety. In this case, Volkswagen never argued that compliance with FMVSS 208 was an affirmative defense.

Even if it were viewed as a limitation on the Safety Act's broad preemption provision, Section 1397(k) indicates, at most, Congress' intent not to occupy the entire field of motor vehicle safety, so that common law claims could continue to

be brought in areas not covered by a federal Safety Standard. Faced with similar provisions in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow states to enforce state law claims that conflict with federal law. 450 U.S. at 328. Rather, general savings clauses are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." And in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907), the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common law] remedies" (internal quotations omitted)) could not be read to save common law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

This Court has consistently adhered to these pronouncements. See, *e.g.*, *Morales*, 112 S. Ct. at 2037;

International Paper Co. v. *Ouellette*, 479 U.S. 481, 493-494 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976). Consistent with these precedents, Section 1397(k) may have been added to the Safety Act not to defeat the statutory goal of creating a set of nationally uniform motor vehicle safety standards, but rather to indicate Congress' intent not to preempt the remainder of the field of motor vehicle safety not covered by and not inconsistent with those federal standards.

This case is a good example: FMVSS 208 expressly grants, for safety reasons (see pages 2-5, *supra*), a choice of several types of safety restraint designs for automobiles. Section 1397(k) would thereby preserve a common law claim that a restraint system in a vehicle was negligently manufactured or installed, because those subjects are not addressed by — and do not conflict with — any Federal Motor Vehicle Safety Standard. On the other hand, it would not preserve a common law action, such as the claim under review here, seeking to recover damages from a defendant merely for exercising the federally-granted option to utilize a passive restraint system design approved by the federal safety agency, NHTSA. Such a lawsuit is plainly inconsistent with FMVSS 208 because it extinguishes a choice granted, as a matter of safety, by the Department of Transportation. See, *e.g.*, *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992).

D. Summary

In the final analysis, the court below correctly decided the express preemption issue. That issue, however, was not dispositive of the preemption claim asserted by Volkswagen; as discussed above, the Court of Appeals also held that petitioner's claims were impliedly preempted. Yet petitioner has not raised the implied preemption issue, and that issue does not in any event warrant review by this Court. Finally,

even if the implied preemption issue were properly presented and petitioner prevailed on that issue, she still would not prevail on the merits of her common law claims because of the jury's verdict. In sum, the petition clearly does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1995

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No. 94-1910

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

ERIN DYKEMA,

Petitioner,

v.

VOLKSWAGENWERK AG, a foreign corporation, VOLKSWAGEN OF AMERICA, INC., a foreign corporation,

Respondents,

STATE OF WISCONSIN, a sovereign body, and THE TRAVELERS INSURANCE CO., a foreign corporation,

Defendants.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Wisconsin

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. PROCEDURALLY, THIS CASE IS IN PERFECT POSTURE FOR THIS COURT TO RESOLVE THE CONFLICTS CONCERNING THE EXPRESS PREEMPTION ISSUES LEFT UNRESOLVED IN *FREIGHTLINER CORP. V. MYRICK* 2

A. Petitioner Has Neither Abandoned Nor Waived Her Claim Of Jury Misconduct 2

B. The Wisconsin Court Of Appeals Did Not Address Implied Preemption, And Petitioner Has Not Waived Her Right To Contest The Issue 5

II. CONTRARY TO RESPONDENTS' ASSERTION, *CIPOLLONE* DID NOT CHANGE THE LAW CONCERNING EXPRESS PREEMPTION UNDER THE SAFETY ACT 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Boyle v. Chrysler Corp., 177 Wis.2d 207, 501 N.W.2d 865 (Ct.App. 1993), *review denied*, 179 Wis.2d clxxxvii, 510 N.W.2d 137 (1993) 5, 6

Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777 (3rd Cir. 1992) 7

Cipollone v. Liggett Group, Inc., ___ U.S. ___, 112 S.Ct. 2608 (1992) 1, 2, 5, 8

Freightliner Corp. v. Myrick, 514 U.S. ___, 115 S.Ct. 1483 (1995) 9

Hernandez-Gomez v. Leonardo, 180 Ariz. 297, 884 P.2d 183 (1994), *vacated and remanded, Volkswagen of America, Inc. v. Hernandez-Gomez*, ___ U.S. ___, 115 S.Ct. 1819 (1995) 2, 7, 8

Hyundai Motor Co. v. Phillip, 639 So.2d 1064 (Fla.App. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 901 (1995) 2

In Interest of Jamie L., 172 Wis.2d 218, 493 N.W.2d 56 (1992) 3, 4

Myrick v. Freuhauf Corp., 13 F.3d 1516 (11th Cir. 1994), *affirmed on other grounds, Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995) .. 2, 8, 9

Perry v. Mercedes Benz of North America, Inc., 957 F.2d 1257 (5th Cir. 1992) 7

Pokorny v. Ford Motor Co., 902 F.2d 1116 (3rd Cir. 1990), *cert. denied*, 498 U.S. 853 (1990) 7

TABLE OF AUTHORITIES – Continued

Page

State v. Johnson, 153 Wis.2d 121, 449 N.W.2d 845 (1990) 3, 4

Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) 8

OTHER AUTHORITES:

Sec. 809.62(2)(a), Wis. Stats 3

Sec. 809.62(6), Wis. Stats 3

Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, § 23.2 (2d Ed. 1995) 4

Robert L. Stern, *Supreme Court Practice*, § 6.26 (7th Ed. 1993) 4

S.Rep. No. 1301, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. and Admin. News 2709, 2720 10

H.R.Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) 10

ARGUMENT

Respondents erroneously assert that the express preemption issue in this case is purely academic, claiming that petitioner has waived her rights with respect to the jury misconduct and implied preemption issues. No such waiver has occurred, since neither of these issues was addressed by the Court of Appeals of Wisconsin in this case and petitioner did, indeed, address the implied preemption issue in her petition. See Pet. 27-30. A decision by this Court reversing the Wisconsin Court of Appeals' finding of express preemption would affect the outcome of the case, because the case would then be remanded to the Wisconsin court for decisions concerning implied preemption and jury misconduct.

It is understandable respondents have devoted so much of their brief to the above-mentioned procedural arguments, because they have utterly failed to rebut petitioner's showing that there is a clear conflict between the decision of the Wisconsin Court of Appeals with regard to express preemption and every other decision of the federal courts of appeal addressing the issue of express preemption of common law claims for motor vehicle defects under the National Traffic and Motor Vehicle Safety Act ("Safety Act"). Respondents claim that the decision in *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992) will cause all the federal courts who have previously rejected express preemption claims under the Safety Act to reconsider, and apparently reverse, those rulings. Resp. Brief 16-18. However, respondents rely solely on cases involving questions of preemption under dissimilar acts of Congress, cite not a single federal circuit or state supreme court case involving the Safety Act

supporting their contention as to express preemption, and blatantly ignore the decisions in *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 884 P.2d 183 (1994), *vacated and remanded, Volkswagen of America, Inc. v. Hernandez-Gomez*, ___ U.S. ___, 115 S.Ct. 1819 (1995); *Myrick v. Freuhauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *affirmed on other grounds, Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995); and *Hyundai Motor Co. v. Phillip*, 639 So.2d 1064 (Fla.App. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 901 (1995), all subsequent to *Cipollone*, finding no express preemption of common law claims for defects in motor vehicles under the Safety Act.

Respondents' argument that *Cipollone* mandates a finding of express preemption under the Safety Act shows just how far awry preemption analysis under the Safety Act has gone and verifies the need for this Court to resolve the conflicts.

I. PROCEDURALLY, THIS CASE IS IN PERFECT POSTURE FOR THIS COURT TO RESOLVE THE CONFLICTS CONCERNING THE EXPRESS PREEMPTION ISSUES LEFT UNRESOLVED IN *FREIGHTLINER CORP. V. MYRICK*.

A. Petitioner Has Neither Abandoned Nor Waived Her Claim Of Jury Misconduct.

On appeal to the Wisconsin Court of Appeals, petitioner requested a new trial on the grounds of jury contamination and misconduct. Pet. App. 2-3. Respondents admit that the Wisconsin Court of Appeals never addressed the jury misconduct issue, because of its preemption holding. Resp. Brief 7.

By petitioning the Wisconsin Supreme Court to review the Wisconsin Court of Appeals' decision on the only issue it considered, federal preemption, petitioner has not abandoned or waived her right to have the jury misconduct issue ultimately considered upon remand to the Wisconsin Court of Appeals. Although sec. 809.62(6), Wis. Stats., provides that "petitioner cannot raise or argue issues not set forth in the petition unless ordered otherwise by the [s]upreme [c]ourt," this does not alter the procedure whereby upon reversal of the court of appeals, the supreme court would remand the matter for determination of the jury misconduct issue. Petitioner did not have the right to have the Wisconsin Supreme Court consider the jury misconduct issue, because it was not decided by the court of appeals. Sec. 809.62(2)(a), Wis. Stats., requires that a petition for review to the Wisconsin Supreme Court must contain "[a] statement of the issues presented for review, . . . and how the court of appeals decided the issues." It is ridiculous for respondents to claim that petitioner should have presented the jury misconduct issue to the Wisconsin Supreme Court for review, when the court of appeals never made a decision on the matter.

The two Wisconsin cases cited by respondents in support of their claim of waiver on the jury misconduct issue are distinguishable from this case. In both *In Interest of Jamie L.*, 172 Wis.2d 218, 493 N.W.2d 56 (1992), and *State v. Johnson*, 153 Wis.2d 121, 449 N.W.2d 845 (1990), the court was addressing the duties of a respondent, not a petitioner, to raise issues before the Wisconsin Supreme Court. Different rules apply to petitioners and respondents as to what issues may be raised. *See generally,*

Robert L. Stern, *Supreme Court Practice*, §6.26 at 344 (7th Ed. 1993), a text which was cited favorably by the Wisconsin Supreme Court in *In Interest of Jamie L.*, 172 Wis.2d at 233, 493 N.W.2d at 63.

Moreover, the cases cited by respondents do not support their claim of waiver. In *Johnson*, the supreme court ultimately addressed the issue, 153 Wis.2d at 126, 449 N.W.2d at 847, and in *In Interest of Jamie L.*, the court remanded the matter to the court of appeals for consideration of the issues the court of appeals did not address. 172 Wis.2d at 233, 493 N.W.2d at 63. These cases follow the general rule that the supreme court has discretion to review any substantial issue the case may present, but when the supreme court reverses the court of appeals where the court of appeals has not considered all the issues presented to it, the usual practice is to remand for disposition of the issues not resolved. *See generally*, Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, §23.2 (2d Ed. 1995).

Thus, respondents' claim of waiver with regard to the jury misconduct issue is specious and not supported by any law in the State of Wisconsin. If the Wisconsin Court of Appeals erroneously found express federal preemption, then the case should be remanded to the court of appeals to consider the questions of implied preemption and, if such is rejected, jury misconduct.

B. The Wisconsin Court Of Appeals Did Not Address Implied Preemption, And Petitioner Has Not Waived Her Right To Contest The Issue.

Respondents contend that the decision of the Wisconsin Court of Appeals is based upon a finding of implied preemption and petitioner has waived her right to contest that issue, because she did not address it in her petition. All of these assertions are incorrect.

The Wisconsin Court of Appeals in this case stated that the holding and analysis in its prior decision in *Boyle v. Chrysler Corp.*, 177 Wis.2d 207, 501 N.W.2d 565 (Ct.App. 1993), *review denied*, 179 Wis.2d clxxxvii, 510 N.W.2d 137 (1993), controlled. The *Boyle* decision found express preemption of a claim for absence of airbags, and then went on to state that "[a]s an alternative ground" for its holding, the claim based on lack of passive restraints was also implicitly preempted. Given the finding of express preemption, the *Boyle* court's discussion of implicit preemption was unnecessary to its decision. Moreover, it is inconsistent with the procedure for analysis of federal preemption issues set forth by this Court specifying that if the statute contains a reliable indicium of congressional intent leading to a finding of express preemption, then there is no need for the court to address implied preemption. *Cipollone*, 112 S.Ct. at 2618.

The Wisconsin Court of Appeals in petitioner's case limited its reliance on *Boyle* to the finding of express preemption. After first indicating that the holding in

Boyle controlled, the court of appeals explained this general statement by stating:

> The VWRA system with which VW elected to equip the 1978 Volkswagen Rabbit complies with requirements of FMVSS 208, and therefore "is within the purview of the *explicit* preemption provision prohibiting states from requiring different restraints." [*Boyle*] at 217, 501 N.W.2d at 869.

Pet. App. 8. (emphasis added.)

The above citation to *Boyle* comes from the section of the *Boyle* decision entitled "Explicit Preemption." *Boyle*, at 216-19, 501 N.W.2d at 869-70. The court's conclusion in this case was that "while other standards promulgated under the Safety Act may not evince congressional intent for federal preemption, FMVSS 208 does evince such intent." Pet. App. 7-8, n.4

Thus, the Wisconsin Court of Appeals in this case referred specifically to explicit preemption, and nowhere in its decision does it even mention, let alone discuss, the analysis for implied preemption.

Additionally, it is not accurate to say that petitioner has not addressed implied preemption in her petition. At pages 27-30 of the petition, petitioner presents her views concerning the implied preemption issue. Petitioner points out the differences between this type of case and a case based upon a failure to install airbags or passive restraints, thus distinguishing it from *Boyle*. Petitioner points out that her claim of a lack of adequate restraint which could be cured by adding a lap belt is the same kind of claim which was found not to be preempted,

either expressly or impliedly, in *Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257 (5th Cir. 1992), and *Pokorny v. Ford Motor Co.*, 902 F.2d 1116 (3rd Cir. 1990), *cert. denied*, 498 U.S. 853 (1990).

When it comes to implied preemption analysis, the distinction between petitioner's case and those cases involving claims for lack of passive restraints is important. As *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3rd Cir. 1992), noted, the basis for a finding of preemption in a "no-airbag" case is the special expression of congressional intent with regard to protecting an option not to include airbags or other passive restraints in an automobile, thereby preventing states from prematurely making airbags or automatic seatbelts mandatory. *Id.* at 708-81. To the contrary, there is no expression of congressional intent to protect an option not to include another type of restraint, such as a lap belt or something such as the window netting in *Pokorny*.

Even though the Wisconsin Court of Appeals' decision is based solely on express preemption, given the fact that the issue has been raised by both petitioner and respondents before this Court in this case, this Court certainly has the power to take on the issue, if it wishes. Petitioner believes the better approach would be, after a reversal of the Wisconsin Court of Appeals, decision finding express preemption, to remand the matter to the Wisconsin Court of Appeals for determination of the implied preemption issue. This would be akin to what the Court did recently in *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 884 P.2d 183 (1994) *vacated and remanded, Volkswagen of America, Inc. v. Hernandez-Gomez*, ___ U.S. ___, 115 S.Ct. 1819 (1995), where the Court remanded the case

back to the Arizona Supreme Court for a determination of the implied preemption issue.

II. CONTRARY TO RESPONDENTS' ASSERTION, *CIPOLLONE* DID NOT CHANGE THE LAW CONCERNING EXPRESS PREEMPTION UNDER THE SAFETY ACT.

Respondents claim that the conflict between the decision in this case and all of the federal court decisions and most of the state court decisions on the issue of express preemption is based only on cases decided before *Cipollone* and that those courts which rejected express preemption under the Safety Act would reconsider those rulings in light of *Cipollone* and subsequent decisions concerning the Federal Insecticide, Fungicide and Rodenticide Act, the Medical Device Amendments of 1976 to the Federal Food, Drug and Cosmetic Act, and the Federal Boat Safety Act. Resp. Brief 16-18. This is profoundly incorrect, in that subsequent to *Cipollone*, (1) in *Myrick*, the Eleventh Circuit Court of Appeals followed its decision in *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), and rejected express preemption under the Safety Act, (2) in *Hernandez-Gomez*, the Arizona Supreme Court also rejected express preemption under the Safety Act, and (3) in *Hyundai Motor Co. v. Phillip*, the Third District Court of Appeals of Florida rejected preemption under the Safety Act.

All of the cases (cited at Resp. Brief 16-18) respondents rely upon for their claim that *Cipollone* has reversed

the expansive body of authority finding no express preemption under the Safety Act involve safety statutes with different provisions from those in the Safety Act. Particularly, none have preemption provisions using the words "safety standard," a pivotal term in the preemption clause of the Safety Act. Additionally, the Safety Act includes a savings clause which has been interpreted to prevent express preemption. The interpretation of the preemption clause and the savings clause in the Safety Act are the issues which were unresolved by this Court in *Freightliner Corp. v. Myrick*, 514 U.S. ___, 115 S.Ct. 1483 (1995).

Respondents also claim that the savings clause is only for the purpose of negating the affirmative defense of compliance. However, this is a distinction without a difference. Respondents raised preemption as an affirmative defense. Pet. App. 15-18. Moreover, the court of appeals' decision in this case expressly states that because the VWRA system complied with FMVSS 208, then petitioner's claims are expressly preempted. Pet. App. 8. This amounts to an affirmative defense of compliance with the government standard when even respondents admit that the savings clause negates such an effect.

The legislative history confirms that Congress intended that the savings clause would preserve all common law remedies for injuries arising from defective motor vehicles, notwithstanding the manufacturer's compliance with the safety standards. The Senate Report on that section states that "the Federal, minimum safety standards need not be interpreted as restricting State common law standards of care. Compliance with such standards would thus not necessarily shield any person

from product liability at common law." S.Rep. No. 1301, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. and Admin. News 2709, 2720. Similarly, the House Report reads "It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to . . . tort liability." H.R.Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966).

Respondents' argument about the location of the savings clause is also unpersuasive, given the fact that in numerous cases previously cited, courts have found the savings clause to interrelate with the preemption clause in the Safety Act.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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